

# The Future of *Bush v. Gore*?

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*At the beginning of the Roberts Court, this Article considers three dimensions of the Rehnquist Court's most famous precedent, examining the precedent's potential for influencing the development of the law along each of these dimensions. First, to what extent will the Equal Protection holding of the Court's opinion in Bush v. Gore generate a new domain of meritorious Equal Protection challenges to voting inequalities? Second, to what extent will the Supreme Court's willingness to stop the Florida recount in 2000 result in greater judicial intervention into voting procedures while they are underway? And third, to what extent will the intense media and academic criticism of Bush v. Gore affect the Court's role in constitutional cases generally?*

*The Article will devote more space to the first of these questions, because elections in 2004 and 2006 revealed a myriad of fact patterns that generate potentially meritorious claims requiring detailed substantive analysis of the Equal Protection precedent. Even so, the Article's answer to the second question (also based on insights from voting-related litigation in 2004 and 2006)—that Bush v. Gore discourages judicial intervention into the voting process—is significant, because it corrects a misreading by many eager litigants of the signal sent by the Court. And as for the case's long-term implications for constitutional law generally, they are likely to be minimal, because the reason for the case's extreme notoriety (its role in identifying the winning presidential candidate) is likely to be its least important attribute over time.*

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I. INTRODUCTION<sup>†</sup>

As the Supreme Court transitions from Chief Justice Rehnquist to Chief Justice Roberts, and from Justice O'Connor to Justice Alito, it is worth speculating about the future of *Bush v. Gore*.<sup>1</sup> This speculation is of a piece with prognostications about the fate of any important Rehnquist Court precedent during the tenure of the new Roberts Court, especially those decided by 5-4 votes. Consider *Grutter v. Bollinger*,<sup>2</sup> the affirmative action case involving the University of Michigan Law School: will Justice O'Connor's opinion for the Court survive even for the twenty-five years she set as time for taking another look at the issue?<sup>3</sup> Likewise, in an adjacent field of election law—the regulation of campaign finance—will *McConnell v. Federal Election Commission*,<sup>4</sup> the monumental decision upholding core provisions of the McCain-Feingold reform law, last even another year, when *Federal Election Commission v. Wisconsin Right to Life* (currently before the Court<sup>5</sup>) threatens to undermine one of those core provisions?<sup>6</sup>

Any of these inquiries couples two considerations: first, the general disposition of the Roberts Court to the doctrine of *stare decisis*, a topic of much attention in the Roberts and Alito confirmation hearings, as well as

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<sup>†</sup> [Editor's Note: The writing of this Article was completed in the spring of 2007, prior to the oral arguments and decisions of numerous cases referenced in the Introduction and discussion of cases implicating the principles of *Bush v. Gore*.]

<sup>1</sup> 531 U.S. 98 (2000).

<sup>2</sup> 539 U.S. 306 (2003).

<sup>3</sup> *Id.* at 343. Presumably, the Court's current consideration of race-conscious student assignment plans in K-12 education will not result in an outright overruling of *Grutter*, but it could sharply limit its scope and force, leading to its earlier-than-expected demise. See Dahlia Lithwick, *Affirmative Inaction: Anthony Kennedy is Sort of Horrified by Voluntary School Desegregation*, SLATE, Dec. 4, 2006, <http://www.slate.com/id/2154853/> (discussing the oral argument in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*).

<sup>4</sup> 540 U.S. 93 (2003).

<sup>5</sup> 127 S. Ct. 1145 (2007) (granting plenary review to *Wisconsin Right to Life v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006)).

<sup>6</sup> The case concerns the "electioneering communication" provision of the McCain-Feingold law. In *McConnell*, the Court rejected a facial challenge to that provision. If in *Wisconsin Right to Life* the Court sustains the as-applied challenge, and subsequently it proves too difficult to distinguish between permissible and impermissible applications of the provision, then five votes may develop to invalidate the statute in its entirety, thereby overruling this portion of *McConnell*.

recent scholarly attention;<sup>7</sup> and second, particular features of each precedent that might make it more or less susceptible to overruling, curtailment, or—just the opposite—expansion. *McConnell*, for example, suffers from the vulnerability that three sitting Justices are dead set against it,<sup>8</sup> at least with respect to one important aspect of the decision, and thus the respect for precedent that *stare decisis* requires is insufficient to overcome the obligation these Justices feel to rid First Amendment jurisprudence of what they perceive to be an especially egregious anathema. Even if Chief Justice Roberts and Justice Alito do not share this view, they could undermine the workability of *McConnell* in the pending *Wisconsin Right to Life* case, and subsequently go along with overruling *McConnell* on grounds of unworkability (a fate that similarly befell *National League of Cities*<sup>9</sup> in *Garcia*<sup>10</sup> after being subjected to an intractable line-drawing morass).

*Bush v. Gore*, however, is very different from *McConnell* with respect to the question of its ongoing status as a precedent in the era of the Roberts Court. For one thing, unlike *McConnell*—or *Grutter*, for that matter—*Bush v. Gore* was not a case in which Justice O'Connor joined the so-called liberal wing of the Court (Stevens, Souter, Ginsburg, and Breyer), and therefore replacing her with Justice Alito does not automatically suggest the precedent's vulnerability. Moreover, identifying the precedent of *Bush v. Gore* that would be entitled to respect according to the doctrine of *stare decisis* is not straightforward. Whether you like *McConnell* or not, you know what it holds: the First Amendment does not bar Congress from prohibiting corporations and unions from funding electioneering messages. Same with *Grutter*: Equal Protection does not rule out the use of race as a factor in university admissions. By contrast, exactly what *Bush v. Gore* holds is not so clear: it invalidates variation in recount procedures, at least with respect to the differential treatment of dimpled or hanging chads, but one is not precisely sure about the scope of its underlying principle.<sup>11</sup> In part because of

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<sup>7</sup> See, e.g., Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1173 (2006) (depicting *stare decisis* as "hotly contested"); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 155 (2006) ("Constitutional *stare decisis* is a hot topic.").

<sup>8</sup> See *McConnell*, 540 U.S. at 257 (Scalia, J., dissenting) (would overrule *Austin*, on which *McConnell* rests); *id.* at 274 (Thomas, J., dissenting) (same); *id.* at 330 (Kennedy, J., dissenting) (same).

<sup>9</sup> *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>10</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985).

<sup>11</sup> Many have commented on the uncertainty of the holding in *Bush v. Gore*. See, e.g., Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 671 (2006); Richard B. Saphire & Paul Moke, *Litigating Bush v. Gore in the States: Dual Voting Systems and the Fourteenth Amendment*, 51 VILL. L. REV. 229,

this uncertainty, moreover, Justices hostile to the Equal Protection precedent of *Bush v. Gore* might be able to easily eviscerate it without needing to overrule it formally (a point with implications that this Article will examine).

In addition, *Bush v. Gore* has significance beyond its Equal Protection holding as a case about when federal courts will intervene in state recount proceedings. Indeed, the 5-4 division in *Bush v. Gore* did not concern the substance of the Court's Equal Protection holding, but rather the majority's remedial decision to preclude any further recounting of presidential ballots. Thus, when speculating about *Bush v. Gore* in the era of the Roberts Court, one must consider the future of not just its Equal Protection ruling, but also its remedial decree: in what circumstances will the Court block the ongoing operation of a state's vote-counting, or perhaps even vote-casting, procedures? Part III of this Article addresses this second dimension of the case's potential significance, concluding that—contrary to conventional wisdom—the case is best understood as discouraging, rather than encouraging, lower-court interference with a state's voting procedures while in operation or about to get underway.

Furthermore, considering the future of *Bush v. Gore*, whether in its Equal Protection or remedial dimensions, is complicated by the brute fact that the case concerned a presidential election. Although that fact is what makes the case so salient, it also has the potential of robbing the case of future significance. Indeed, the majority opinion itself famously cautioned against making too much of the case in the future.<sup>12</sup> To be sure, those cautionary words appeared in the context of discussing the Equal Protection issue, but it may be taken as an overall signal about the uniqueness of the case: when, if ever, will there be another case in which the outcome of a presidential election turns on the idiosyncratic failure of a single state to provide with sufficient specificity procedures for deciding whether similarly contestable ballots are counted or discarded?<sup>13</sup> Part IV of this Article considers the potential broader implications of *Bush v. Gore* in light of its exceptional prominence as a case involving a presidential election.

Despite the daunting task that confronts any speculation about the future of *Bush v. Gore*, this Article will do so in the hope that systematic reflection illuminates what is at stake as a result of the uncertainty that surrounds this topic. Disputes over the scope of the Equal Protection holding in *Bush v.*

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265 (2006); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 765 (2001). See also Marcia Coyle, *Close Vote to Turn on 'Bush v. Gore'?*, NAT'L L.J., Nov. 1, 2004, at 1.

<sup>12</sup> *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

<sup>13</sup> See, e.g., Laurence H. Tribe, *eroG .v hsuB and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors*, 115 HARV. L. REV. 170, 270–71 (2001).

*Gore* have already arisen in the lower courts, and such disputes are likely to widen and deepen over time, unless the Supreme Court intervenes to nip them in the bud. Likewise, differences of opinion among federal judges about when they should intervene in the operation of a state's voting procedures have already forced the Supreme Court to issue its first decision since *Bush v. Gore* on this remedial topic: *Purcell v. Gonzalez*,<sup>14</sup> which, although far from settling the scope of federal court remedial authority over state voting procedures, sends a cautionary signal about the use of litigation to affect the voting process when it is underway or imminent.

Speculating what paths the law will take on both the Equal Protection and remedial dimensions of *Bush v. Gore* may help to bring about some measure of clarity to these major yet murky issues of election law. This Article will devote much more attention to the Equal Protection dimension of *Bush v. Gore* (Part II) than to its remedial dimension (Part III), or even to its unique institutional implications as a case involving resolution of a presidential election (Part IV). The reason is that if there is to develop a body of law emanating from *Bush v. Gore* as a precedent, that law most likely will focus on the case's Equal Protection holding. The other two aspects of the case are less directly tied to its legal ruling, but are more radiations or emanations of that ruling. Nonetheless, I offer some observations on those aspects as well in the hope they are useful to other scholarship on the future ramifications of *Bush v. Gore*.

## II. THE EQUAL PROTECTION HOLDING IN *BUSH V. GORE*

The facts of *Bush v. Gore* are well ingrained in the consciousness of any election law specialist, as is the language of the Court's opinion that identifies an Equal Protection violation on those facts. Nonetheless, a quick review is necessary to set the stage. It will remind us of just how uncertain we must be about the holding of *Bush v. Gore* itself and, thus, how difficult the task of predicting its future.

### A. *A Quick Review of the Case*

The key fact for Equal Protection purposes in *Bush v. Gore* was that some dimpled chads were counted while others were not, depending upon which specific recount rule was operative at the particular time and place these dimpled chads were reviewed. Likewise, some punctured chads were counted and others were not, depending on whether the operative rule required a chad to be "hanging" instead. These variations existed across counties as well as within counties, as some counties changed their rules

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<sup>14</sup> 127 S. Ct. 5 (2006).

midstream and, given uncertainties over what rule to apply, some individual recount officials applied rules different from those applied by other officials within the same county. This variability in recount rules was caused by insufficient specificity in Florida's recount law, which simply provided that the review of each chad should endeavor to identify "the intent of the voter."<sup>15</sup>

According to the Court, these facts were enough to establish an Equal Protection violation. Indeed, the Court saw the case as one of constitutional *res ipsa loquitur*. It described what had happened:

Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal.<sup>16</sup>

Then, in the very next sentence, the Court forthrightly declared: "This is not a process with sufficient guarantees of equal treatment."<sup>17</sup> The Court identified other Equal Protection concerns as well—the fact that some counties included overvotes in addition to undervotes in their recounts, while others did not, and the fact that the recounts might remain incomplete in some counties while completed in others<sup>18</sup>—but there is no doubt that the Court would have found an Equal Protection violation if the only problem before it had been the variation in treatment of dimpled and punctured chads caused by the lack of a sufficiently specific recount rule in state law.

What remains in doubt, and very much so, is *why* this problem alone constitutes an Equal Protection violation. As is often observed, the Court said very little in support of its decision.<sup>19</sup> It did point out that recount rules more specific than discerning "the intent of the voter" were feasible in this context. Given their feasibility, the Court considered them obligatory: "The formulation of uniform rules to determine intent based on these recurring

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<sup>15</sup> *Bush*, 531 U.S. at 105–06 (per curiam).

<sup>16</sup> *Id.* at 106.

<sup>17</sup> *Id.* at 106–07.

<sup>18</sup> *Id.* at 108–09.

<sup>19</sup> Tribe, *supra* note 13, at 221. See also Cass R. Sunstein, *The Equal Chance to Have One's Vote Count*, 21 LAW & PHIL. 121, 126 (2002) (defending the minimalist reasoning of *Bush v. Gore*). But see. Cass R. Sunstein, *Lawless Order and Hot Cases*, in A BADLY FLAWED ELECTION 75, 90 (Ronald Dworkin ed., 2002) (criticizing *Bush v. Gore* as a "subminimalist" decision).

circumstances is practicable and, we conclude, necessary.”<sup>20</sup> But the Court never identified the principle that derives obligation from feasibility.

The Court also pointed out that the recount process it was reviewing was a court-ordered one, and, therefore, uniformity could be expected (again, to the extent feasible) over the scope of the recount covered by the court’s order, in this case all presidential ballots statewide. “[W]e are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.”<sup>21</sup> The Court added: “When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.”<sup>22</sup> But the Court did not go further in saying what those “rudimentary requirements” were. Nor did the Court explain why a statewide recount triggered by a state statutory requirement rather than court order—but resulting in the same variation in treatment of dimpled chads (because the state statute simply directed the recount to identify “the intent of the voter”)—might not constitute the same sort of Equal Protection violation.

Moreover, the Court did not merely say little. It went out of its way to make clear that it did not want to say more. “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”<sup>23</sup> This most-mocked sentence in the Court’s opinion—and unfairly so—is not an avowal of an unprincipled power grab, but most likely is just a caution that the Court’s holding may not be as broad as some might wish or think.<sup>24</sup> Even so, a line like this makes it difficult to distinguish which new cases would be governed by *Bush v. Gore*, resulting in a similar finding of unconstitutionality, and which would not.

### B. *A Taxonomy of Potential Bush v. Gore Claims*

Even before *Bush v. Gore* was decided, speculation had started over the potential implications of a ruling that the Florida recount procedures violated Equal Protection. At oral argument, the question arose whether the use of different types of voting machines in different counties within a state might violate Equal Protection given the wide variation in error rates among these

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<sup>20</sup> *Bush*, 531 U.S. at 106 (per curiam).

<sup>21</sup> *Id.* at 109.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See Steven J. Mulroy, *Lemonade From Lemons: Can Advocates Convert Bush v. Gore Into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL’Y 357, 364 (2002).



machines.<sup>25</sup> Indeed, the Court's desire to forestall the assumption that this result would inevitably flow from its holding was what prompted it to issue its cautionary words about the potential narrowness of the decision. ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."<sup>26</sup>)

Now that a few election cycles have occurred since *Bush v. Gore*, it is possible to discern a wide array of potential cases that might arise where that precedent is cited to support a claimed Equal Protection violation. It is still far too early for a large body of lower court precedents to have developed concerning these types of cases. Nonetheless, pending or contemplated litigation over events that occurred in recent elections inevitably invites speculation about which fact patterns give rise to a valid Equal Protection claim and which do not.

The fact patterns that have emerged thus far can be classified into at least four different categories of potential *Bush v. Gore* claims. From narrowest to broadest, in relationship to the facts of *Bush v. Gore* itself, they are: (1) differential treatment of ballots caused by insufficiently specified standards; (2) differential treatment of ballots caused by failure to follow specified standards; (3) variations in local voting administration practices resulting from local discretion specifically authorized by state law; and (4) local variations in the ease or difficulty of casting a ballot as a result of intentional decisions by central administrators to distribute election-related resources unequally among localities. An explanation of each category will provide a foundation for attempting to predict the likelihood that the Court would consider cases within each category as establishing an Equal Protection violation.

### 1. *Insufficiently Specified Standards*

This category is the closest to *Bush v. Gore* itself. But it encompasses fact patterns that have nothing to do with chads (dimpled, punctured, or otherwise). For example, as revealed in 2004, different election officials may reach opposite results concerning the eligibility of provisional ballots because state law fails to specify sufficiently rules for making these eligibility determinations.<sup>27</sup>

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<sup>25</sup> Transcript of Oral Argument at 74, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949).

<sup>26</sup> *Bush*, 531 U.S. at 109 (per curiam).

<sup>27</sup> See Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193 (2005). See also THE EAGLETON INSTITUTE OF POLITICS, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY & THE MORITZ COLLEGE OF LAW, THE OHIO STATE UNIVERSITY, REPORT TO THE U.S. ELECTION ASSISTANCE COMMISSION ON BEST

In many states, the relevant statute provides only that local election officials must determine whether a provisional ballot was cast by a registered voter without specifying the steps that these local officials must take to verify the voter's registration.<sup>28</sup> As a result, some local officials simply check their electronic database to see if it contains a record for the provisional voter, whereas other local officials will take the extra step of double-checking registration forms in the event that a clerical error prevented the electronic database from accurately recording the provisional voter's valid registration. This variation in local procedures, as a result of the insufficiently specified state standard, results in the rejection of some provisional ballots equivalent to others that are counted.

The outcome of the 2004 gubernatorial election in Washington almost turned on a clerical error of this kind. Litigation caused local officials to discover that they had rejected several hundred ballots because they had failed to check signatures against original registration records, not just computer databases.<sup>29</sup> Once this mistake was revealed, local officials voluntarily chose to count the previously rejected ballots, thereby avoiding a further Equal Protection challenge based on *Bush v. Gore*.<sup>30</sup> The decision to count these previously rejected ballots gave the election to the Democratic candidate rather than the Republican.<sup>31</sup>

In 2006 in Ohio, a federal court suit was filed alleging that the requirement in state law that says merely that local officials must examine their "records" to determine the eligibility of provisional voters is insufficiently specific.<sup>32</sup> "The statute does not specify which 'records' Boards of Elections should examine, or impose any requirements that every Board of Elections examine the same record,"<sup>33</sup> as the complaint in the case

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PRACTICES TO IMPROVE PROVISIONAL VOTING PURSUANT TO THE HELP AMERICA VOTE ACT OF 2002, PUBLIC LAW 107-252, at 15 (June 28, 2006) [hereinafter *BEST PRACTICES*].

<sup>28</sup> *BEST PRACTICES*, *supra* note 27, at app. F.

<sup>29</sup> Wash. State Democratic Cent. Comm. v. King County Records, Elections & Licensing Servs. Div., No. 04-2-36048-0-SEA (Wash. Super. Ct. King County. Nov. 16, 2004), available at <http://moritzlaw.osu.edu/electionlaw/docs/WSDCC/WSDCCorder2.pdf>.

<sup>30</sup> The Washington Supreme Court affirmed that the local officials were entitled to amend their official returns in this way. Wash. State Republican Party v. King County Div. of Records, 103 P.3d 725, 727-28 (Wash. 2004).

<sup>31</sup> Chris McGann & Lewis Kamb, *GOP to Fight Gregoire Victory: Democrat Wins Second Recount by 130 Votes*, SEATTLE POST-INTELLIGENCER, Dec. 24, 2004, at A1; Chris McGann, *Third Time May Be a Charm for Gregoire: She Leads by 10 as Court Allows 735 County Ballots*, SEATTLE POST-INTELLIGENCER, Dec. 23, 2004, at A1.

<sup>32</sup> OHIO REV. CODE ANN. § 3505.183(B)(1) (LexisNexis Supp. 2007).

<sup>33</sup> Complaint at 31, Ne. Ohio Coal. for the Homeless v. Blackwell, 2006 U.S. Dist. LEXIS 78158 (S.D. Ohio Oct. 26, 2006) (No. C2-06-896) [hereinafter *NEOCH v.*

puts it, clearly invoking a *Bush v. Gore* claim as a basis for relief. Asking for a declaratory judgment that the insufficient specificity of Ohio's provisional ballot laws violates Equal Protection, the suit also seeks an injunction requiring the Secretary of State to issue sufficient clarifying directives to assure uniform application of the law in all the state's counties.<sup>34</sup>

Furthermore, there are other ways in which local variation can occur in the verification of provisional ballots as a result of insufficiently specific state laws. Whether a provisional ballot will count or not can depend on whether the signature on the provisional ballot's envelope matches, in the view of local election officials, the signature on file for that voter. If state law does not specify how local officials are to determine whether or not the two signatures match, more lenient local standards may cause more provisional ballots to be counted there than in localities with more stringent signature matching standards.<sup>35</sup> Likewise, state law may require a match between the name on the provisional ballot's envelope and the name on the corresponding registration form, and yet fail to specify whether a "Hank" matches a "Henry," or a "Dotty" matches a "Dorothy."<sup>36</sup> Or state law may fail to tell

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*Blackwell*], available at [http://moritzlaw.osu.edu/electionlaw/docs/WSDCC/WSDCC\\_order2.pdf](http://moritzlaw.osu.edu/electionlaw/docs/WSDCC/WSDCC_order2.pdf).

<sup>34</sup> *Id.* at 51. On November 1, and then again on November 14, the federal court adopted Consent Orders agreed to by the parties for the purpose of counting provisional ballots for the 2006 election.

<sup>35</sup> The disputed 2004 gubernatorial election in Washington included the claim that the lack of a specific uniform standard for checking signatures on absentee or provisional ballot envelopes with signatures on voter registration forms caused county-by-county disparities in rates at which ballots were rejected. *McDonald v. Reed*, 103 P.3d 722, 723 (Wash. 2004). This claim seems to have been based on Equal Protection as embodied in state rather than federal constitutional law. *Id.* at 723–24 ("Petitioners suggest in their reply brief that a claimed disparity in signature-checking standards implicates equal protection concerns under the privileges and immunities clause of our state constitution . . ."). In any event, the state supreme court rejected the claim in part because it could not discern a specific signature-matching standard that it could compel election administrators to follow: "Significantly, petitioners do not suggest that any particular method of signature verification is faulty, or what uniform method should be mandated by the Secretary." *Id.* at 724 n.2.

In another recent case, *Harrison v. Stanley*, 193 S.W.3d 581 (Tex. App. 2006), which involved a tie vote in a city council election, a Texas state appeals court rejected a claim that local election officials improperly rejected three mail-in ballots because the signatures on their envelopes did not match signatures on file. This decision provoked a dissent from denial of en banc consideration on the ground that the signature-rejecting procedures employed to reject these ballots were a violation of Equal Protection according to the principles articulated in *Bush v. Gore*. See *Harrison*, 193 S.W.3d at 589 (Jennings, J., dissenting from denial of en banc consideration).

<sup>36</sup> See JUSTIN LEVITT, WENDY R. WEISER & ANA MUNOZ, BRENNAN CTR. FOR JUSTICE, MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR

local officials what to do if some provisional ballot envelopes are smudged, illegible, or contain technical errors or omissions, with the consequence that some local officials bend over backwards to count any provisional ballot they are capable of verifying, while others are willing to reject any provisional ballot that is deficient in some way.<sup>37</sup>

The new voter identification laws of 2006, at least in Ohio, created new ways in which provisional ballots might receive differential treatment by local officials as a result of insufficiently specific state rules.<sup>38</sup> Under these

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VOTER REGISTRATION 8–9 (2006), *available at* [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_35559.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_35559.pdf). One current lawsuit over database matching raises a different issue: whether a state violates federal statutory law requiring a match in order to enter a new voter in the registration database. The federal district court has preliminarily enjoined the State of Washington's enforcement of this kind of law, which was adopted in the aftermath of that state's fiasco in its gubernatorial election of 2004. *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006).

<sup>37</sup> The first wave of litigation alleging discrepancies of this kind occurred in 2004. *See, e.g.*, Amended Complaint at 40–41, *League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 742 (N.D. Ohio 2006) (No. 3:05CV7309) (“In at least one county (Greene), voters casting provisional ballots in the correct precincts apparently were disenfranchised when poll workers ran out of envelopes for their precinct and instructed voters to use envelopes borrowed from other precincts. On information and belief, the ballots cast in the “wrong” envelopes apparently were not counted even though the poll workers had noted the correct precinct number on the borrowed envelopes.”). *See also id.* at 42 (“[O]n information and belief, Cleveland officials alone disqualified approximately one-third of the provisional ballots—a rate that is extremely high and indicative of otherwise eligible provisional ballots being thrown out because of errors in the balloting process, not because of voter ineligibility.”).

These kinds of allegations again surfaced in 2006. *See* Complaint, *supra* note 33, at 37 ([T]he statute does not explain whether Boards of Elections would be permitted to reject and not count provisional ballots simply because they find themselves unable—whether due to technical constraints, an insufficient amount of time before the results must be certified, or insufficient manpower—to determine whether some or all provisional voters are qualified, registered or eligible to vote.”). *See also id.* (“The Defendant has not issued guidance regarding what circumstances would allow or justify Boards of Elections to conclude that they are unable to determine whether a voter is qualified, registered or eligible to vote.”). As it turned out, in Ohio in 2006, the Secretary of State adopted a deliberate policy of refusing to provide clarifying standards to local boards of elections. *See* Internet Video: 2008 and Beyond: The Future of Election and Ethics Reform in the States (Kent State Univ. 2007), <http://dept.kent.edu/columbus/symposium/> (remarks of current Secretary of State, concerning the policy of her predecessor, at a symposium held in Columbus, Ohio on Jan. 17, 2007).

<sup>38</sup> Ohio's new voter ID laws were enacted in two phases. The main part, including those provisions applicable to conventional in-precinct voting, was adopted as part of the state's general overhaul of its voting administration law in 2005, a piece of legislation known as “HB3.” Some of the ID provisions applicable specifically to Ohio's new “no fault” absentee voting regime were adopted in the law establishing that regime, HB234.

laws, provisional ballots must be rejected if the voter fails to provide proper identification;<sup>39</sup> thus, local variation in the understanding of what counts as proper identification, because the new state law is insufficiently clear, can cause provisional ballots submitted with the exact same form of ID to be counted or rejected depending upon the particular locality in which they are cast. Indeed, two weeks before Election Day in Ohio, a lawsuit alleged that local disparities had already emerged in the counting of absentee ballots, with the threat of similar disparities in the counting of provisional ballots cast on Election Day.<sup>40</sup> The suit identified several different ways in which ballots were being treated differently in different localities because of insufficient guidance from the state's legislature or Secretary of State: (1) different local interpretations of when a utility bill is "current"; (2) different local interpretations of what qualifies as "other government identification" (for example, those issued by state universities); and (3) different local interpretations of whether one or both numbers displayed on a state driver's license qualify as a "driver's license number." A partial settlement of the suit before Election Day, combined with the failure of any statewide race to end up close enough where litigating the remaining issues might make a difference to the outcome, ultimately prevented a statewide recount involving an Equal Protection claim premised on the precedent of *Bush v. Gore*.

Nonetheless, the question remains whether any of these fact patterns involving the differential treatment of provisional ballots because of insufficiently specified standards in state law, if these fact patterns were to make their way to the U.S. Supreme Court, would be recognized as establishing an Equal Protection violation on the authority of *Bush v. Gore*.

## 2. Failure to Follow Specified Standards

Both the 2004 and 2006 elections generated allegations about local variations in the treatment of voters and their ballots not only because of insufficiently specific statewide standards, but also because of the failure by some local officials to follow statewide rules even when they are spelled out. For example, with respect to provisional ballots in Ohio and elsewhere, even after administrative directives and pre-election court decisions clarified that provisional ballots count only if they are cast in the correct precinct,

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These new ID rules are codified at OHIO REV. CODE ANN. §§ 3505.18, 3509.03 (LexisNexis Supp. 2007).

<sup>39</sup> OHIO REV. CODE ANN. § 3505.183(B)(4)(a) (LexisNexis Supp. 2007). See also Nathan Cemenska, *50 Questions for 5 States, Ohio, Answer to Question 31*, ELECTION LAW @ MORITZ, Sept. 5, 2006, [http://moritzlaw.osu.edu/electionlaw/election06/50-5\\_ohio.php#31](http://moritzlaw.osu.edu/electionlaw/election06/50-5_ohio.php#31).

<sup>40</sup> Complaint, *supra* note 33, at 31.

allegations surfaced that officials in some localities deviated from this policy, counting provisional ballots as long as the voters were registered.<sup>41</sup>

Some localities took it upon themselves to adopt the so-called “right church, wrong pew” compromise position, meaning that they would count provisional ballots cast at any precinct that shared the same polling place with other precincts (a school gymnasium, for example), even if the provisional ballot was submitted to the wrong precinct table within that polling location, but would reject a provisional ballot cast at a polling place that did not include the correct precinct for that ballot. Local variation on this compromise position might be viewed as the exercise of discretion in the absence of sufficiently clear instructions if state law were properly understood to remain unresolved on the “right church, wrong pew” point. But where state law was clear, even if rigidly unforgiving, local decisions to adopt the “right church, wrong pew” compromise are examples of local failure to follow specific state rules, thereby causing differential treatment of similarly situated provisional ballots depending upon the voter’s locality. In other words, some provisional ballots cast in the “right church, wrong pew” situation would be rejected, while, across the state, provisional ballots cast in this same situation would be counted.

An effort to minimize the number of provisional ballots cast in the wrong precinct led to another way in which local variation resulted from some local officials failing to follow specific state rules. States requiring the rejection of these “wrong precinct” provisional ballots adopted specific statewide rules instructing poll workers to inform provisional voters that their ballots would not count if cast in the wrong precinct and that voters instead should go to the correct precinct in order to cast a ballot that would count. These statewide rules further required poll workers, based on information available at all polling places within a county, to tell the would-be provisional voter where to go to cast a countable ballot based on that voter’s home address. In 2004 and again in 2006, allegations arose that some poll workers failed to follow these instructions.<sup>42</sup> As a consequence, some voters who showed up at the

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<sup>41</sup> Amended Complaint, *supra* note 37, at 42–45, 54. See also BEST PRACTICES, *supra* note 27, at app. D, 7–11; Michael Gisick, *Counting of Final Ballots to Begin*, ALBUQUERQUE TRIB., Nov. 13, 2006, at A1; Jo Mannies, *Disputed Ballots from Aug. 3 Primary Will be Counted*, ST. LOUIS POST-DISPATCH, Aug. 28, 2004, at 15; Bill Sloat, *Democrats Take Up Fight Over Ballots*, CLEVELAND PLAIN DEALER, Nov. 18, 2004, at A1.

<sup>42</sup> Amended Complaint, *supra* note 37, at 43; Lee Bailey, *Letter to the Editor, Board of Elections Makes Mistakes, Too*, COLUMBUS DISPATCH, Nov. 30, 2006, at A18; Carl Chancellor, *Citizens Tell Panel of Voting Troubles*, AKRON BEACON J., Nov. 21, 2004, at B1. See also Kevin Mayhood, *Groups Sue to Block Voter ID Rules: Union, Homeless Coalition Argue Measure is Being Applied Inconsistently Across State*, COLUMBUS DISPATCH, Oct. 25, 2006, at D3.

wrong precinct were successfully redirected to the right place so that they were able to cast a ballot that counted, whereas other voters had no such luck and instead submitted a provisional ballot that was ultimately rejected because it was cast at the wrong precinct. This disparate treatment of voters, moreover, was not merely between different counties of the same state, but also within counties, as the failure of poll workers to follow these instructions occurred at different polling places within the same county and, indeed, at different times of the day within the same polling place. In this respect at least, the variable treatment of similarly situated voters was comparable to what occurred in *Bush v. Gore*, although the cause of the variation was different (local rule-breaching versus local gap-filling).

Likewise, in 2006, local errors in the enforcement of new voter identification rules caused disparities in the treatment of similar ballots. For example, Ohio's new voter ID law was complicated (because it provided a wide array of qualifying forms of ID), yet upon careful inspection it was clear that an unexpired driver's license sufficed even if it did not show the same address as where the voter currently lived and was registered to vote. Nevertheless, there were widespread reports of local officials failing to understand this aspect of the new law.<sup>43</sup> The preemptive litigation in Ohio that produced a settlement shortly before Election Day prevented ballots from being rejected because of this mistake.<sup>44</sup> But similar errors by local officials occurred in other states: for example, requiring photo ID even when state law (or a recent court order) permitted alternative forms of non-photo ID.<sup>45</sup>

In all these examples of local error, the question is whether the resulting disparate treatment of similarly situated ballots—some count while others do not, even though they share the same characteristics—violates the Equal

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<sup>43</sup> Kevin Mayhood & Robert Vitale, *Provisional Ballots Given Some Leeway*, COLUMBUS DISPATCH, Nov. 15, 2006, at A1; Jennifer Mrozowski, *Some Voters Get Tripped Up on New ID Rules, Machines*, CINCINNATI ENQUIRER, Nov. 8, 2006, at A1; Jennifer Mrozowski, *Vexed Voters Include Chabot*, CINCINNATI ENQUIRER, Nov. 8, 2006, at B2. See also Ann Fisher, *Handling of Voter-ID Issue Did Not Inspire Confidence*, COLUMBUS DISPATCH, Nov. 6, 2006, at C1.

<sup>44</sup> Consent Order at 3, *NEOCH v. Blackwell*, No. C2-06-896 (S.D. Ohio Nov. 1, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCHConsentOrd.pdf>.

<sup>45</sup> See BRIEFING: THE 2006 ELECTION, ELECTIONLINE, Nov. 2006, at 10, <http://electionline.org/Portals/1/Publications/EB15.briefing.pdf>; Brian Feagans, *Photo, Please? Some Didn't Get It*, ATLANTA JOURNAL-CONSTITUTION, Nov. 8, 2006, at D12; Leah Thorsen & Elizabeth Holland, *Voting Glitches—Not Many*, ST. LOUIS POST-DISPATCH, Nov. 8, 2006, at B1; Ian Urbina, *Polling Places Report Some Snags; Even Top Politicians Have Trouble*, N.Y. TIMES, Nov. 8, 2006, at P1; Tova Andrea Wang & Jonah H. Goldman, *Fixing the 2008 Election*, Nov. 14, 2006, <http://www.reformelections.org/commentary.asp?opedid=1440>.

Protection Clause. Certain kinds of errors have the effect of counting ballots that should have been rejected (for example, local leniency regarding provisional ballots cast at the wrong precinct), while other errors cause ballots to be rejected that should have been counted (for example, erroneously stringent enforcement of ID rules, or failure to inform wrong-precinct provisional voters where to go instead). Perhaps this distinction makes a difference under the Equal Protection Clause, although arguably the resulting inequality in the ability to cast a countable ballot is unconstitutional in both situations. After all, the Clause protects against discrimination with respect to the right to vote, whether that discrimination is viewed as some citizens enjoying greater voting opportunities than others, or some citizens suffering from lesser voting rights than others. In any event, it remains unsettled what will be the ultimate resolution of Equal Protection claims involving either differentially favorable or unfavorable local errors in the administration of statewide voting rules.

### 3. *Specific, State-Authorized Local Discretion*

This next category is the one that surfaced in *Bush v. Gore* itself and has received the most sustained attention since then, including vigorous debate between the majority and dissenting opinions in *Stewart v. Blackwell*, a Sixth Circuit case presenting an Equal Protection challenge to the use of different types of voting machines in different Ohio counties.<sup>46</sup> The complaint focused on the use of punch-card machines in some counties, the same type that produced the problem of dimpled and punctured chads in *Bush v. Gore*, in comparison with touchscreen machines, which do not present the same problem of machine-rejected ballots. The Sixth Circuit panel decision sustained the Equal Protection challenge by a hotly divided 2-1 vote, and that panel decision was vacated by a decision of the full Sixth Circuit to hear the case en banc, but on the eve of oral argument the appeal was voluntarily withdrawn as moot on the ground that punch card machines had since been replaced and were unlikely to return.<sup>47</sup>

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<sup>46</sup> 444 F.3d 843 (6th Cir. 2006) (panel decision regarding plaintiffs' Equal Protection claim reversed; panel opinion regarding plaintiffs' Voting Rights Act claim vacated; and rehearing en banc granted), *superseded by* 473 F.3d 692 (6<sup>th</sup> Cir. 2007) (en banc), *vacating as moot* 356 F. Supp. 2d 791 (N.D. Ohio 2004). (My Moritz colleague Dan Tokaji was an attorney for the plaintiffs in this case.)

<sup>47</sup> One must read the panel majority and dissents in their entirety to get a full sense of vitriol hurled at each other. But one snippet may provide an indication. In response to the dissent's assertion that the court "should heed the Supreme Court's own warning and limit the reach of *Bush v. Gore* to the peculiar and extraordinary facts of that case," *Stewart v. Blackwell*, 444 F.3d at 886 (Gilman, J., dissenting), the majority retorted:



The use of different types of voting machines in different counties within a state was also challenged in Florida.<sup>48</sup> There, however, the particular claim was that the use of touchscreen machines without a paper trail was a denial of Equal Protection because counties employing optical scan machines would have a paper record in the event of a recount. The plaintiffs claimed that a paper record gave voters a measure of protection lacking to voters in a county with paperless touchscreen machines. A panel of the Eleventh Circuit unanimously rejected this claim, and the Supreme Court recently denied certiorari.<sup>49</sup>

These complaints about different vote-counting technologies in different localities within a state present a claim that is analytically distinct from the Equal Protection claim in *Bush v. Gore*, as the Court itself recognized.<sup>50</sup> The problem is not local variation in the implementation of a vague statewide directive. Rather, the state law is unambiguous in giving local officials the authority to choose among different types of vote-counting technologies. And, although the different error rates of these different machines provides the basis for the Equal Protection challenge to the machines that are more error prone, these cases are analytically different from those involving the erroneous failure of local officials themselves to follow state law. The local decision to employ the more error-prone technology was not itself a failure to

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Murky, transparent, illegitimate, right, wrong, big, tall, short or small; regardless of the adjective one might use to describe the decision, the proper noun that precedes it—"Supreme Court"—carries more weight with us. Whatever else *Bush v. Gore* may be, it is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it.

*Id.* at 859 n.8.

<sup>48</sup> *Wexler v. Anderson*, 452 F.3d 1226, 1227 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 934 (2007).

<sup>49</sup> *Id.* at 1233. Although not necessarily incorrect in this result, the Eleventh Circuit's reasoning—that overall votes were not more likely to be lost using paperless touchscreens instead of optical scans—might be viewed as prematurely naïve in light of the 18,000 undervotes on paperless touchscreen machines in Florida's Thirteenth congressional district in 2006. (For information on the issues involved concerning the conflict over Florida's 13th congressional district, see Election Law @ Moritz, Recount Roundup 2006: Florida-13, <http://moritzlaw.osu.edu/electionlaw/news/RecountRoundupFlorida13thDistrict.php> (last visited Oct. 30, 2007)). While ballot design may turn out to be the primary culprit in this particular case, a paper record of the touchscreen vote might have helped some voters discover the fact that they had skipped this race, and in any event the paper record could assist in ruling out certain kinds of machine errors as the cause of the undervote. Moreover, dissatisfaction with paperless touchscreens in the context of a recount may lead Congress to enact a new national paper-record requirement.

<sup>50</sup> *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam). See also text accompanying note 25.

follow state law; on the contrary, state law specifically permitted this local decision.

The fact that this kind of claim is analytically distinct from the one presented in *Bush v. Gore* itself does not necessarily make it unmeritorious. To be sure, the majority opinion in *Bush v. Gore* warned against assuming the validity of this kind of claim. But the majority opinion did not purport to foreclose it. Thus, the merits of these challenges to local variation in voting technology must be considered in light of more general Equal Protection principles, a task that the appeals court judges in these two cases attempted to undertake.

This analytically distinct third category of claims, however, potentially involves more than just local variation in the choice of different vote-counting machines. It could also include local variations in other aspects of the voting administration process that could differentially affect the ability of citizens to exercise their right to vote. For example, it could involve the failure of locally chosen technology concerning parts of the voting administration process other than the counting of ballots, as occurred on a calamitous scale in Denver during the 2006 election.<sup>51</sup> That city, as authorized by state law, had adopted a new form of “electronic pollbook” to facilitate the verification of a voter’s registration on Election Day. That system, full of promise but inadequately tested, crashed as soon as poll workers throughout the city attempted to access electronically the centralized database of registration records at the same time. The consequence was horrendously long lines, several hours in length, that prevented perhaps as many as 20,000 voters from casting a ballot that day as they had intended. This discriminatory disenfranchisement of some Colorado citizens almost formed the basis of a challenge to two statewide races, but both turned out not to be quite close enough for this number of disenfranchised voters to have made a difference. Had a contest occurred, it would have been expected that one of the legal grounds for challenging the discriminatory disenfranchisement that resulted from the local choice to use this untested technology would have been an Equal Protection claim. The argument would have been that, although the defective electronic pollbooks in Denver did not disenfranchise voters as directly as defective punch-card or paperless touchscreen machines in some counties in Ohio or Florida, nonetheless the local choice and faulty implementation of this defective technology had the effect of disenfranchising a subset of the state’s eligible voters.

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<sup>51</sup> For a collection of news stories describing the Denver meltdown, see Election Law @ Moritz, Recount Roundup 2006: Colorado Secretary of State, <http://moritzlaw.osu.edu/electionlaw/news/RecountRoundup2006ColoradoSecretaryofState.php> (last visited Oct. 30, 2007).

Of course, it does not take technological failures for the misguided exercise of local discretion to cause the discriminatory disenfranchisement of voters in that locality. Local officials, delegated by state law to decide how many voting machines to use in each precinct, may make woefully thickheaded choices, with the consequence that an insufficient supply of machines causes inordinately long lines to occur at some precincts but not others. As is well known, something like this occurred in several Ohio counties in 2004, with lines lasting as long as seven hours at one polling place, while voters elsewhere in the state breezed in and out in 30 minutes or less.<sup>52</sup>

Similar administrative misjudgments may occur at the local level with respect to hiring and training of poll workers. If a particular county has poorly trained poll workers, or not enough of them, or (even worse) both, the consequence may be excessively long lines that prevent voters from casting a ballot, just as if too few machines or some kind of technological failure causes those unendurable lines. More catastrophic still, some local decisions may cause there to be too few provisional ballots on hand at particular precincts, with the consequence that some voters are unable to cast a ballot no matter how long they are able to wait in line.

During the Maryland primary election in 2006, some poll workers resorted to using scrap paper as makeshift ballots to avoid disenfranchisement of this kind.<sup>53</sup> Of course, if other poll workers in the same situation were unwilling to accept such an unorthodox remedy, then the resulting differential treatment of these similarly situated voters presents another form of potential Equal Protection claim.

After the 2004 election in Ohio, the League of Women Voters filed a complaint claiming that all these forms of administrative mismanagement—and more—caused discriminatory disenfranchisement of Ohio voters depending upon the locality in which they lived.<sup>54</sup> The case has the potential of being one of the most significant in the field of voting administration, as the complaint essentially asks the federal court to take over supervision of the state's entire voting administration system. The district court has denied the state's motion to dismiss, ruling that the facts alleged, if true, amount to a

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<sup>52</sup> See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1238–39 (2005).

<sup>53</sup> Susan Biddle, *A Look at What Went Wrong in Montgomery*, WASH. POST, Sept. 14, 2006, at A25; Melissa Harris, *Provisional Ballots Getting Close Attention; Painstaking Sorting Process is Under Way*, BALT. SUN, Sept. 19, 2006, at B5.

<sup>54</sup> Amended Complaint, *League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 723 (N.D. Ohio 2005) (No. 3:05-CV7309), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/amendedcomplaint.pdf>.

valid Equal Protection claim in light of *Bush v. Gore*.<sup>55</sup> The state's interlocutory appeal, certified by the district court because of the case's importance, is pending before the Sixth Circuit (although presumably not the same panel that decided *Stewart v. Blackwell*).<sup>56</sup> The case is likely to settle before the Sixth Circuit decides the appeal, however, because the 2006 election has brought a change in Ohio's Secretary of State, who has expressed sympathy with the League's complaint and is seeking to have the case amicably resolved.<sup>57</sup>

#### 4. Local Variations by Central Design

Some inequalities in a voter's ability to cast a ballot may be caused by decentralized decision making—different local boards making different judgments about how many voting machines, poll workers, or provisional ballots they need at each polling location—but some local inequalities may be the result of a deliberate, centralized decision. For example, a central planner may decide to equip each precinct with the same number of voting machines without taking account of differences in expected turnout, or differences in the number of items to vote (more “down-ballot” candidates or issues in some precincts compared to others), or differences in the average speed at which voters can complete their ballots (caused by differences in age, literacy levels, or perhaps other socioeconomic factors). Because of this “one size fits all” approach, excessively long lines emerge at some local precincts, but not at others.

This fourth category of possible *Bush v. Gore* claims can occur when the central decisionmaker is itself a county election board, rather than a statewide authority, and the complaint is about discriminatory disenfranchisement among voters at different precincts within the single county. In this respect, this kind of claim resembles the variability in recount rules applied to equivalently dimpled chads within a single Florida county, but the cause of inequality is not different interpretations of a vague standard by different individual officials (or a change in interpretation by local

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<sup>55</sup> *League of Women Voters v. Blackwell*, 432 F. Supp. 2d 723, 728 (N.D. Ohio 2005).

<sup>56</sup> The appellate papers, along with the district court documents in the case, are available at <http://moritzlaw.osu.edu/electionlaw/litigation/lwv05.php>. The identity of the Sixth Circuit panel for this case will be revealed publicly two weeks before the oral argument. See 6th Cir. I.O.P. 34(c)(2).

<sup>57</sup> Mark Niquette & James Nash, *Elections Suits May Be Settled: Brunner, Dann to Rethink Those with Constitutional Merit*, COLUMBUS DISPATCH, Jan. 18, 2007, at C1. The article quotes the new Secretary of State, Jennifer Brunner, as saying in reference to the *League of Women Voters* case: “[T]he kinds of things they're pushing for are things that make it easier and better for people to vote, and why would we be against that?”

authorities). Moreover, unlike *Bush v. Gore* itself, or the examples involving local variations in evaluating the eligibility of provisional ballots, this kind of claim does not involve local officials making ballot-by-ballot decisions to reject, rather than count, a vote. Instead, it involves the central decisionmaker deliberately allocating electoral resources in a way that provides citizens with unequal voting opportunities depending upon the precinct in which they live.

Claims in this fourth category may end up having little chance of success. Superficially, they appear similar to complaints about unequal educational opportunities at schools in different localities as a result of centralized decisions concerning the method of financing school operations, a kind of Equal Protection claim that was rejected by the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez*.<sup>58</sup> But an evaluation of the merits of this kind of claim is not the point right now; merely, the observation that they form an analytically distinct category from those previously considered. Moreover, the merits of particular cases within this category may ultimately depend on the strength of their particular facts. Suppose, for example, that a county election board sends only half the number of provisional ballots to some precincts compared to others, based on predictions of different turnout rates—predictions that themselves turn out to be egregiously incorrect and based on irresponsible assumptions. Would the resulting inability of some voters to cast ballots, because of the particular polling place where they go to vote, really not state a plausible Equal Protection claim worthy of more extensive consideration?

To be sure, polling place inequalities by themselves would not be enough to establish an Equal Protection violation. The provisional ballots for one polling place could all be destroyed when the truck taking them there skids off the road and catches on fire. Similarly, a power outage in one part of town may cause voting to stop for several hours at polling locations in the area, causing lines there to back up to over four hours in length, while voting proceeds smoothly across town. Presumably, the state action doctrine applicable to Equal Protection claims would preclude valid claims arising from voting inequalities caused by “acts of God,” unless, of course, responsibility could be attributed to state or local officials in adopting inadequate contingency plans. If it turned out that some counties had adopted superior contingency plans—for example, backup generators for their voting machines in the event of a power outage—then complaints about unequal voting opportunities in different counties would fall into the third category of *Bush v. Gore* claims: those involving different county-level choices in exercising voting administration discretion delegated by the state.

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<sup>58</sup> 411 U.S. 1, 44–55 (1973).

### C. *Do New Bush v. Gore Claims Have "Right Answers"?*

With at least these four analytically distinct categories of possible Equal Protection claims to consider (and there may be more), it is difficult to project the future of *Bush v. Gore* as a precedent. Which of the potential claims we have identified will prove meritorious, and which will not? This question is exceedingly vexing for reasons both jurisprudential and practical. Nonetheless, it is worth exploring, if only to shed some light on why it is so difficult to answer.

In undertaking this inquiry we should start with the assumption that, whenever each new Equal Protection claim that invokes the authority of *Bush v. Gore* is put before a court on its merits, the question of whether that claim should be sustained or rejected is one that, in law, has an objectively correct answer, even if that answer is extremely difficult to ascertain. This assumption, associated most famously with the jurisprudence of Ronald Dworkin, is undoubtedly controversial, although perhaps more so than it should be for reasons that Dworkin himself has endeavored to explain.<sup>59</sup> The objectivity of the correct answer we assume to exist is not a metaphysical proposition; rather, it is simply a shared conviction on both sides of any case, when each side argues that it deserves to win under the law, that its argument is indeed better and its victory would not be entirely arbitrary from the standpoint of the law itself.<sup>60</sup> Whenever anyone claims that *Bush v. Gore* itself was wrongly decided, or, conversely, whenever anyone endeavors to defend its Equal Protection decision against its critics, one is making this very basic assumption about the existence of an objective truth as to whether *Bush v. Gore* was a proper or improper decision.

The objectivity of the law in this limited sense, moreover, is what all judges presume as a professional matter when they purport to decide a case correctly, including when as dissenters they assert that the majority got the case *wrong* (and not merely had an inferior subjective preference about what the outcome should be). Indeed, it is the congruence between every judge's professional attitude in each case and Dworkin's "right answer" jurisprudential claim that makes that claim so cogent, even in the face of its many practical and theoretical difficulties.

When all is said and done, we might have to abandon our assumption that there is a right answer to each case that presses a claim based on the precedent of *Bush v. Gore*. We may have to conclude that it is not meaningful to search for right answers to claims derivative of *Bush v.*

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<sup>59</sup> See RONALD DWORKIN, JUSTICE IN ROBES 41–43 (2006).

<sup>60</sup> Here's how Dworkin himself puts it: "Have you yourself found any ordinary legal argument on balance the soundest, in any kind of hard case? Then you, too, have rejected the no-right-answer thesis I take to be the target of my own claim." *Id.* at 42.

*Gore*—perhaps not even in the same way that we presume it meaningful to search for (and make arguments about) right answers in affirmative action, campaign finance, or other kinds of cases involving contested propositions of constitutional law. If so, then we would have to wonder whether *Bush v. Gore* has created a distinctive jurisprudential problem not applicable in other areas, or whether, instead, it has exposed a deep-rooted jurisprudential uncertainty not evident elsewhere (analogous perhaps to the way that protons do not appear to be composed of elusive quarks except on impact from high-energy bombardment by particle accelerators). But before leaping to any conclusion of this sort, we should endeavor to consider whether evaluating the merits of claims based on *Bush v. Gore* is susceptible to the same traditional forms of legal reasoning that we would apply to any other difficult question of constitutional law. As Dworkin himself has acknowledged, the search for right answers to difficult legal questions is an aspirational undertaking, one that we do to keep faith with our shared sense of community, and in this spirit we can start out by aspiring to identify the right answer to the various novel claims premised on *Bush v. Gore* that we have been able to identify.<sup>61</sup>

In undertaking this endeavor, we can employ Dworkin's construct of the ideal judge, Hercules, who strives towards legal truth using full power of human knowledge and perspicuity.<sup>62</sup> In invoking Justice Hercules, we do not need to embrace all the methodological arguments that Dworkin makes about how Hercules would attempt to identify the right answer to a difficult constitutional question. Over the last few years, there has been a vigorous debate between Dworkin and Cass Sunstein about to the extent to which an

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<sup>61</sup> Dworkin recently acknowledged the aspirational quality of his quest for objectively correct answers to difficult legal questions: "We cannot be sure, before we look, that constructive interpretation can produce integrity in any particular area of law. But we have no reason to think, in advance, that it cannot." Ronald Dworkin, *Response*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 291, 304 (Scott Hershovitz ed., 2006). This passage appears in response to an essay by Jeremy Waldron, who also highlighted the aspirational quality of Dworkin's quest:

[T]his is where Dworkin should take his stand against the Critics. He should say (and does say): it is not clear up front that attempts to argue in the mode of law-as-integrity are doomed to failure. If it were clear, we should have no reason to resist the siren charms of pragmatism: forget the existing law; ask instead what is best for the future; and take one's chances on the legitimacy issue. . . . But [because the law is] complicate[d] and muddy . . . , there is nothing to do but try, for nothing else will reveal whether an attempt can succeed while keeping faith with the motivations behind integrity.

Jeremy Waldron, *Did Dworkin Ever Answer the Critics?*, in *EXPLORING LAW'S EMPIRE*, *supra*, at 155, 181.

<sup>62</sup> DWORKIN, *supra* note 59, at 54.

ideal judge would think theoretically about the particular cases that must be adjudicated.<sup>63</sup> Dworkin emphasizes that occasionally the ideal judge must invoke higher-level principles to determine the correct resolution to the particular facts under consideration. Sunstein, by contrast, cautions against proceeding too quickly to higher-level principles when propositions of law closer to the facts themselves would identify the right resolution.<sup>64</sup> As both these debaters have recognized recently, there is less disagreement between them than appeared initially: both would have the ideal judge start with the facts, resolving cases at the lowest level of principle feasible, but ascending as necessary when more fact-specific reasoning is insufficient.<sup>65</sup> Accordingly, this facts-first approach is what Hercules, as we invoke him, should undertake in his effort to identify the right resolution to claims based on *Bush v. Gore*. In any event, the most important quality that Justice Hercules would bring to a new claim based on *Bush v. Gore* would be a commitment to do what the law requires, regardless of personal views about which side should win for partisan political reasons or even which side's legal argument is preferable from one's own personal ideological perspective.

### 1. *Fact-Dependency and Path-Dependency*

Because Hercules would use the facts-first approach just described, we should begin with the first of the four categories of claims we have identified since it is the most factually similar to *Bush v. Gore* itself. Moreover, because of this factual proximity, it is also the one about which we are most likely to find meritorious claims. But even within this first category, some particular claims may be stronger than others because of their particular facts. Consider, for example, the difference between two versions of local variation concerning the verification of provisional ballots. (Both of these versions are discussed in Part II.B.1 above, in describing this first category of potential claims based on *Bush v. Gore*.) First, some local officials check

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<sup>63</sup> *Id.* at 66–72; Cass R. Sunstein, *Virtues and Verdicts*, THE NEW REPUBLIC, May 22, 2006, at 32, 36–37.

<sup>64</sup> Sunstein's most recent paper on this topic is *Incompletely Theorized Agreements in Constitutional Law* (Univ. of Chicago Law & Econ., Olin Working Paper No. 322, 2007), available at [http://www.ssrn.com/abstract\\_id=957369](http://www.ssrn.com/abstract_id=957369). See also Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2006).

<sup>65</sup> "I now believe that the differences between Sunstein's views and my own are, as he says, much less profound than my differences with Posner." DWORKIN, *supra* note 59, at 25. "Dworkin is quite right to say that analogy is blind without principle," but ideally the Court should "try, whenever it can, to base its decision on the least contentious principles . . ." Sunstein, *supra* note 63, at 37.



original registration forms, whereas others check only computerized registration records. Second, some local officials apply more stringent "matching" standards when comparing information on provisional ballot envelopes (signatures, names, addresses, and so forth) with the corresponding information on file in registration records.

These two versions of local variation differ with respect to the point about practicability mentioned in *Bush v. Gore* itself. It would not seem impracticable for a statewide rule that requires local officials to check whether a provisional voter is registered to specify that this verification process includes an examination of original registration forms as well as computerized records. Certainly, specifying this statewide directive in this way seems no more impracticable than specifying how to treat dimpled or punctured chads.<sup>66</sup>

But specifying standards for matching signatures, names, or other information supplied by a provisional voter is a much more difficult matter. What rules should the state adopt for telling local officials how to compare the handwritten signature on the provisional ballot envelope with the handwritten signature on file? How close in appearance must each letter be? And what about the overall shape or direction of a signature? Handwriting experts may be able to explain their methodologies, but is it possible to write it in a rule for local election officials to follow when conducting their ballot-by-ballot reviews? This rulemaking task would seem significantly more challenging than instructing local officials on what to do with dimpled or punctured chads.

The same point applies, perhaps even more so, to the matching of names on provisional ballot envelopes with names of registered voters. Judgment calls must be made about nicknames, the use of initials rather than names, spelling variations, and so forth. It might not be possible for a statewide rule to do much better than to instruct local officials to verify the provisional ballots when the name of the provisional voter is "substantially equivalent" to the name of a registered voter at the same address (and the handwriting appears the same).<sup>67</sup> Therefore, any variation that might result in the verification of provisional ballots as a result of local officials applying this rather imprecise standard more or less stringently could arguably be considered beyond the scope of the *Bush v. Gore* precedent on the ground of impracticability.

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<sup>66</sup> Cass Sunstein has also observed that feasibility, or what he calls "logistical considerations," must be a factor in any Equal Protection principle emanating from *Bush v. Gore*. See Sunstein, *supra* note 19, at 132.

<sup>67</sup> See LEVITT ET AL., *supra* note 36, at 24 (recommending a "substantial match" standard).

Thus, even if we accept Dworkin's "right answer" jurisprudential thesis in principle, we cannot confidently claim that we know how Justice Hercules would rule in some of these intensely fact-dependent cases. If a case came before Justice Hercules involving local variations in the application of matching protocols for names or signatures on provisional ballot envelopes, he might ultimately be able to discern the correct answer to the Equal Protection claim involving those facts. But his answer likely would depend in large part on expert evidence presented in the case concerning the difficulty of writing those matching protocols with greater specificity in order to reduce the degree of local variation in their implementation. He would need to consider that evidence in light of the practicability factor apparently incorporated into the Equal Protection analysis under *Bush v. Gore*, and he would need to weigh that practicability consideration against other relevant factors (including, presumably, the degree of local variation caused by the existing matching protocols and the extent of the normative harm to adversely affected voters as a result of that variation). Whatever we might say about how Justice Hercules might decide this Equal Protection claim on the factual record before him, it is sheer folly to speculate about what Justice Hercules would do when that factual record does not exist.

When we extrapolate that point from a single case involving matching protocols for provisional ballots to all the factually divergent scenarios we have identified across four categories of potential claims based on *Bush v. Gore*, we see that it is impossible for us to identify in advance the correct implementation of *Bush v. Gore* as a precedent, even if there is a correct way to implement *Bush v. Gore* in principle. We must await the actual litigation of these various *Bush v. Gore* claims and see what factual records they present, to make any kind of definitive judgment on what a correct resolution of them would be. In this respect, identifying the "right answer" to any claim based on *Bush v. Gore* is dependent on the crucible of litigation (a point that Dworkin might accept with respect to any kind of claim, although often it is easier to identify the right answer to some claims without litigation, in somewhat the same way that Heisenberg's Uncertainty Principle in physics does not extend to larger-scale objects). Thus, the truth about the applicability of *Bush v. Gore* to these novel circumstances must remain indeterminate in advance of their facts being presented in court.

The future of *Bush v. Gore* as a precedent is inherently indeterminate in another—perhaps more profound—way, even accepting the Dworkinian premise that each claim has a correct answer once it is factually presented in court. What the correct answer is in any particular case will also depend, in part, on the order in which these cases arrive in court for judicial resolution.

In this respect, the development of precedents into a body of law is path-dependent,<sup>68</sup> a point that Dworkin himself recognizes.<sup>69</sup>

Once the first claim based on *Bush v. Gore* is decided, it becomes a fixed point that affects the proper disposition of the next case and so forth. In each new case, because of the doctrine of *stare decisis*, Justice Hercules does not revisit the correctness of the previous applications of *Bush v. Gore*. In this respect, Justice Hercules is prepared to presume that his predecessors (including himself) may have made a mistake in applying *Bush v. Gore* to a particular Equal Protection claim, but that he is now stuck with that mistake going forward in determining the correct resolution of each new Equal Protection claim. (If it helps, one can imagine Justice Hercules coming to the Court for the first time in each new case, confronted with the handiwork given to him by the mere mortal Justices who preceded him. Alternatively, one can say that even if Justice Hercules is the ideal judge, always motivated by the proper desire to get the law right, it does not mean that he is always perfect in his efforts.) To invoke one common metaphor, Justice Hercules weaves each new precedent into the overall fabric of the law, in order to let that law in its totality determine the outcome of each new case. Doing this for each new precedent based on *Bush v. Gore* is no different from doing it for *Bush v. Gore* itself: after all, even if Justice Hercules would not have decided the Equal Protection claim in *Bush v. Gore* the way that the majority did (an assumption we shall consider further momentarily), giving force to *Bush v.*

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<sup>68</sup> See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 645 (2001) ("The order in which cases are presented to courts will have a significant influence on the legal rule selected."). A recent article questions the extent to which path-dependency actually occurs in constitutional cases decided by the Supreme Court, in large part because of the Court's limited adherence to the doctrine of *stare decisis* in constitutional cases. See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903 (2005). But this Article does not deny that path-dependency exists even in this context at least to some extent. More importantly, this Article does not purport to address the Dworkinian question of how Justice Hercules ideally would decide each new case based on a proper respect for precedent, rather than how the actual Justices function. And as Hathaway herself observes, even if the doctrine of *stare decisis* properly carries less weight in constitutional cases, the widely shared normative view that it carries considerable weight in constitutional cases means that, if the Justices are doing their jobs properly in constitutional cases, these cases will exhibit considerable path-dependency as well. See Hathaway, *supra*, at 656.

<sup>69</sup> Dworkin builds path-dependency into his jurisprudence by invoking the metaphor of a "chain novel": judges over time, he says, are in a collective enterprise writing each new opinion in a way that best honors all their previous opinions, as if they each were entrusted to writing a new chapter in a joint novel, endeavoring to make each new chapter tell the best story overall even if they would not have written the same earlier chapters that their predecessors did. RONALD DWORKIN, *LAW'S EMPIRE* 225–38 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 111–12 (1977).

*Gore* as a precedent under the doctrine of *stare decisis* is itself to recognize the path-dependent nature of Equal Protection law.

Thus, the correct outcome to each of the potential *Bush v. Gore* claims we have identified, and classified into four categories, depends in part on the chronological order in which it is judicially resolved. In other words, even a particular claim that Hercules might find insufficiently strong at the outset—say, excessively long lines at some polling places, but not others, because of local choices about the allocation of electoral resources among precincts—might strengthen over time as a result of a series of intermediary precedents. Conversely, a claim that seems meritorious now might turn out not to be because intervening precedents undercut its validity. Yet, not even Hercules has a crystal ball that will tell him the order in which the merits of these future *Bush v. Gore* claims will reach the Supreme Court, in part because of the inherent unpredictability of both elections and litigation, and in part because of the Court's discretionary control over its own docket.

Accordingly, as we await the development of case law based on *Bush v. Gore*, we cannot comment definitively on what would be its proper development because of its path-dependency.

## 2. *Would the Ideal Judge Overrule Bush v. Gore?*

Even if we confine ourselves to the single strongest possible claim derived from the precedent of *Bush v. Gore*, and even if we hypothesize that this claim is the first one to reach the Supreme Court on the merits, it remains somewhat tricky to discern what Justice Hercules would identify as the correct answer. This is true in part because *Bush v. Gore* was itself such a controversial decision. Although Justice Hercules embraces the doctrine of *stare decisis*, that doctrine permits—indeed requires—the overruling of precedents in some circumstances. Thus, Justice Hercules must consider the possibility that the correct resolution of the strongest possible claim based on the precedent of *Bush v. Gore* is to reject that claim on the ground that *Bush v. Gore* itself should be repudiated.<sup>70</sup>

If the Equal Protection holding of *Bush v. Gore* was so egregiously mistaken, as many commentators have suggested, maybe it should be

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<sup>70</sup> Some scholars, however, who originally found themselves aghast over the Equal Protection holding in *Bush v. Gore*, have begun to reconcile themselves to that decision and consider that it, like other apparent aberrations, should be woven into the fabric of the law. See, e.g., Robert Post, *Sustaining the Premise of Legality: Learning to Live with Bush v. Gore*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 96, 109 (Bruce Ackerman ed., 2002) (describing how, over time, *Bush v. Gore* “merges with the great mass of Supreme Court opinions”). In this respect, these scholars appear to have taken Linda Greenhouse's advice. See Linda Greenhouse, *Learning to Live With Bush v. Gore*, 4 GREEN BAG 365 (2001).

jettisoned at the Court's first opportunity to do so.<sup>71</sup> But overruling *Bush v. Gore* would not be like overruling any other case. Precisely because the Court was so vehemently attacked as being partisan and unprincipled in *Bush v. Gore*, it seems important for the Court to avoid saying, "Guess what? Never mind." That about-face would only confirm the "one ticket only" view of the decision. This sense of the Court's need to look legitimate accords with the Court's own understanding of *stare decisis* articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>72</sup> where concerns over the potential perception of illegitimacy caused the Court to refuse to overrule *Roe v. Wade*.<sup>73</sup>

Nonetheless, the *Casey* approach to the doctrine of *stare decisis* is itself controversial, and Justice Hercules would need to explore more widely competing arguments concerning *stare decisis* in constitutional cases, including whether *Casey* deserves to be recognized as a precedent on the nature of precedent. Examining current discourse on this topic, however, would not give anyone confidence that it is easy to identify a "right answer" to the question of whether Justice Hercules should feel bound to follow *Bush v. Gore* even if he strongly believed that its Equal Protection holding was an egregious error.

There is currently a vigorous debate among scholars of constitutional law on what is the correct doctrine of *stare decisis* to apply in constitutional cases. At one extreme, some scholars believe that the Court's prior precedents should receive virtually no weight: when a Justice believes the Court's prior interpretation of the Constitution incorrect, fidelity to the Constitution itself requires dismissing that precedent as erroneous.<sup>74</sup> At the

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<sup>71</sup> Several scholars have usefully collected the voluminous criticism of *Bush v. Gore*. See, e.g., David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1451-74 (2006); Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643, 1644 (2005); Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004). In hindsight, one wonders whether some portion of the vehemence against the Equal Protection reasoning of *Bush v. Gore* is simply misplaced hostility to the more controversial remedial nature of the decision (that is, to stop the Florida recount rather than permit it to resume using procedures consistent with Equal Protection). If so, there may be less anathema to the Equal Protection holding going forward, and thus less impetus for overruling it. Nonetheless, given the degree to which the Equal Protection holding was condemned in some academic quarters (see Greene's collection of invectives at the beginning of his article, *supra*, at 1644), it is necessary to consider whether that holding is simply too wrong to remain part of Equal Protection law. For a more measured critique, see Richard Briffault, *Bush v. Gore as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325 (2001).

<sup>72</sup> 505 U.S. 833, 854-69 (1992) (joint opinion).

<sup>73</sup> 410 U.S. 113 (1973).

<sup>74</sup> See generally Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

other end of the spectrum, there has been a recent resurgence of the view that the Justices should feel strongly bound by the Court's prior decisions, even if they believe them erroneous, because of the necessity of ongoing institutional legitimacy.<sup>75</sup> In the middle are other scholars, who believe that the obligation to respect precedent carries moderate, but not exceptionally strong, weight in relation to the Justice's own views about the correct interpretation of the Constitution.<sup>76</sup> Given all this intense disagreement among scholars, even if there is an objectively correct doctrine of *stare decisis* for Justice Hercules to identify, we cannot be so presumptuous as to claim that we know for sure which doctrine that would be.<sup>77</sup> (Maybe the very fact that the doctrine of *stare decisis* was such a large part of the recent confirmation hearings for Chief Justice Roberts and Justice Alito would affect Justice Hercules's view of the proper doctrine of *stare decisis* to apply going forward—on some kind of theory that those confirmation hearings involved a popular, or institutional, ratification of this doctrine and that the Justices were required to take notice of this ratification—but this idea is tricky because presumably no Justice, especially not the ideal Justice Hercules, in attempting to discern the correct meaning of the Constitution, should be affected by political pressure that Senators may have exerted during the confirmation process.)

Perhaps, then, it is safest to assume that, whatever Hercules's general theoretical orientation towards respect for precedent in constitutional cases, he would be disinclined to overrule *Bush v. Gore* at the earliest opportunity. The reason would be that, under any doctrine of *stare decisis* Justice Hercules would be likely to embrace, there probably would be sufficient room in that doctrine to justify the proposition that overruling *Bush v. Gore* would be an exceptional case, simply because *Bush v. Gore* itself was an exceptional case. Most approaches to *stare decisis* would count as compelling the objective of avoiding the consequence that only one litigant, presidential candidate Bush, gets the benefit of that Equal Protection ruling before it is jettisoned. The arbitrariness of that consequence would seem to contradict a basic commitment to "the rule of law," a commitment that presumably Justice Hercules values highly as the ideal judge.

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<sup>75</sup> See generally Solum, *supra* note 7; Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005).

<sup>76</sup> RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 115–17 (2001); see generally Farber, *supra* note 7; Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

<sup>77</sup> Dworkin's own jurisprudence calls for a fairly robust, although not absolute, adherence to precedent even in the face of a strong conviction that the precedent was mistaken. See DWORKIN, *LAW'S EMPIRE*, *supra* note 69, at 398. But, of course, it is possible that Dworkin himself may have an incorrect view about the doctrine of *stare decisis* that the ideal judge would employ.

Of course, the Court would not need to overrule *Bush v. Gore* directly in order to render it a dead letter as precedent. The Court will never confront another dimpled or punctured chad, and thus, if there were a principled way of distinguishing those facts from the case before it, Hercules might approve nipping the precedent in the bud before it engenders any other doctrinal damage in Equal Protection law (assuming that Hercules agrees with the proposition that the Equal Protection holding in *Bush v. Gore* was itself a severe mistake).

Consider again the case in which some provisional ballots are rejected while others are counted because some local officials check original registration forms while others check only computerized records.<sup>78</sup> This case, indeed, seems the strongest possible one based on the precedent of *Bush v. Gore* itself. For the reasons stated already, the concern about any impracticability of statewide instructions with sufficient specificity to avoid the disparate treatment in the counting of ballots does not apply on these facts.

Thus, is there a principled basis for distinguishing this local inequality in the verification of provisional ballots from the local inequality involving the dimpled and punctured chads in *Bush v. Gore*? One suggestion might be to focus on the fact that *Bush v. Gore* involved a court-ordered statewide recount, as the majority opinion there pointedly noted. But this basis for distinction might not be available, as the verification of provisional ballots might occur pursuant to a court-ordered statewide recount. In the 2004 gubernatorial election in Washington, for example, if King County had not voluntarily agreed to count several hundred ballots after double-checking original registration records, the Republican candidate would have been certified the winner of that election, and the Democratic candidate would have filed a judicial contest seeking a statewide recount of wrongfully excluded ballots.<sup>79</sup> If the Washington Supreme Court had then approved a recount process in which local counties could decide for themselves what procedures to follow when verifying the registration of provisional voters (a distinct possibility given that state court's earlier rulings in the context of this election<sup>80</sup>), the case could have gone to the U.S. Supreme Court in the exact same procedural posture as *Bush v. Gore* itself—only this time a Democratic

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<sup>78</sup> Again, the only explanation for this unequal treatment of identically situated provisional ballots is that some local officials interpreted a statewide directive to verify the provisional voter's registration as requiring only an examination of computerized records, whereas other local officials interpreted the same unspecific statewide command as requiring an examination of original registration forms as well.

<sup>79</sup> See David Postman, *Votes Tallied for Governor, but What's Next is Unclear*, SEATTLE TIMES, Dec. 26, 2004, at B1.

<sup>80</sup> See Wash. State Republican Party v. King County Div. of Records, 103 P.3d 725 (Wash. 2004) (affirming local discretion on whether to count previously rejected ballots).

candidate would be complaining that the state supreme court had approved a recount process with insufficiently specified standards, with the consequence that some local boards were applying a more generous standard that "recovered more lost votes" (sound familiar?), while other local boards were applying a less generous standard that caused similarly valid votes to remain uncounted. If there is to be a principled distinction between this provisional ballot case and *Bush v. Gore* itself, it must be based on something other than the fact that *Bush v. Gore* involved a court-ordered statewide recount.

The argument might also be made that *Bush v. Gore* involved ballots cast by individuals who were unquestionably entitled to vote. The only issue is whether they had intended their ballot to include a vote for one of the two presidential candidates when the chad had been marked but not detached. By contrast, provisional ballots involve voters whose eligibility is in doubt until verified: that is why they cast a provisional rather than regular ballot.

This argument, however, seems stronger with respect to the problem of variable standards for matching signatures, names, and other information on a provisional ballot envelope with comparable registration records. In that context, if the matching standard is too lenient, it will count provisional ballots that should have been rejected because the provisional voter was not, in fact, registered. But in the case of local variation caused by different degrees of diligence in looking for registration forms that may have been omitted inadvertently from computerized registration records, this concern does not arise. There is no question that these provisional voters are eligible once the extra step is taken to track down their missing original registration form. Thus, as in *Bush v. Gore* itself, local variation in the implementation of an insufficiently specific statewide standard results in the rejection of some ballots cast by eligible voters when those same ballots would have been counted if they had been cast in the other localities.

Moreover, in one significant respect, this particular Equal Protection claim concerning the unequal treatment of equivalent provisional ballots—i.e., those cast by eligible voters whose registration forms are missing from computerized records—seems stronger than the one in *Bush v. Gore* itself. In this situation, the provisional voters themselves did absolutely nothing to contribute to the discriminatory rejection of their ballots. They submitted their registration forms properly. Rather, some form of administrative problem caused these forms to be missing from the computerized registration records. By contrast, the voters with dimpled or punctured chads in *Bush v. Gore* did not detach the chads as they had been instructed to do. Whether some of these voters should suffer the unequal treatment of having their ballots rejected as a result, while others in the same group get the benefit of having their ballots counted notwithstanding their own mistake, is perhaps a



debatable matter.<sup>81</sup> But the provisional voters in the situation we are considering bear no portion of the responsibility for the unequal treatment their provisional ballots receive.<sup>82</sup>

Thus, Hercules would seem hard pressed to reject the Equal Protection claim in this particular provisional ballot situation, given the precedent of *Bush v. Gore*. Perhaps Hercules then would sustain this particular Equal Protection claim, in part to demonstrate that *Bush v. Gore* is not an unprincipled, one-case-only decision, but instead extends at least to one comparable fact pattern involving the unequal treatment of provisional

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<sup>81</sup> See, e.g., RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 99–100 (2001).

<sup>82</sup> Richard Briffault, after reading an earlier draft of this Article, suggested another conceivable way of distinguishing this provisional ballot case from the situation in *Bush v. Gore*, which might justify confining that precedent so as to deny relief in the provisional ballot case. The local officials in Florida tasked with implementing the insufficiently specified standard for counting dimpled and punctured chads knew which candidate would benefit if the ballot were counted, and they knew this crucial piece of information for each ballot they inspected. In this way, the lack of specific standards presented a particularly acute risk of partisan manipulation, as local officials could adjust how lenient or strict they wished to be in discerning “the intent of the voter” depending on whether or not they favored the candidate that would benefit from a determination that the ballot contained a valid presidential vote. By contrast, in the provisional ballot case, the voter’s choice is sealed within the provisional ballot envelope, and therefore a local official who makes a discretionary judgment about what steps to take to verify the eligibility of the provisional voter does not know which candidate will benefit if the provisional ballot is counted.

While this distinction is factually correct as far as it goes, it is by no means clear that it should make a difference in principle, as Briffault himself recognizes. In most localities, it is readily apparent which candidate will most likely benefit from administrative practices that will cause a higher percentage of provisional ballots to be counted. Therefore, if state law provides an insufficiently specific standard for making these administrative determinations, the same incentive exists for local officials to be more lenient or strict in practice depending on which candidate they prefer.

Moreover, even if the risk of partisan manipulation is somewhat greater when the local officials know for sure which candidate benefits from each administrative decision, it is not clear why that fact would provide a principled basis for rejecting the claim of discriminatory disenfranchisement in the provisional ballot case. The voters whose ballots are rejected because of the local application of a stricter standard suffer this discrimination in circumstances that present considerable risk of partisan manipulation, even though there are circumstances presenting yet greater risk of the same problem. When added to the fact that these provisional voters did nothing to put their ballot at risk of being rejected—local officials willing to take the extra steps undertaken elsewhere in the state would discover these voters to be fully eligible, no less so than any conventional voter whose ballots routinely count—it would seem difficult to say that the Equal Protection claim of these provisional voters should be denied at the same time as saying that voters whose dimpled or punctured chads are treated differently from others present a valid Equal Protection claim.

ballots. On this view, the proper scope of the Equal Protection principle generated by *Bush v. Gore* may end up being quite circumscribed, but it is not confined to the unique facts of *Bush v. Gore* alone.

### 3. *How Far Does the Bush v. Gore Principle Extend?*

Assuming Hercules would sustain this particular Equal Protection claim, the question inevitably arises: what about the next strongest fact pattern? That case might be where some ballots, but not others, are rejected because of local variations in implementing voter identification requirements that easily could have been more specific—for example, “current” documents defined more precisely as “dated within six months before Election Day.”

Here, again, there is no dispute about the voter’s underlying eligibility, only whether the voter has provided the correct kind of documentation. The voter’s signature, name, and other information perfectly match the registration record on file, which is easily found. But the ballot still is rejected because the utility bill that the voter submits is not “current” in the eyes of the local officials there, although the same ballot would have been counted elsewhere, because other local officials interpret “current” more generously.

This fact pattern also would seem to fall within the same emerging Equal Protection principle. To be sure, in this situation the voter could have avoided the problem by submitting a piece of identification that in no way would have raised a question about whether it was “current” or not. But the voter’s responsibility for the problem seems no greater in this situation than in *Bush v. Gore* itself. In fact, submitting a marginally acceptable piece of identification seems less of a dereliction on the voter’s part than failing to detach a chad as instructed.

And if Hercules would indeed include this ID-related fact pattern within the Equal Protection principle that emerges from *Bush v. Gore*, then what about an ID-related case from the second analytical category: where local officials reject a ballot because of their mistaken understanding of statewide ID rules rather than their interpretation of insufficiently specific statewide ID rules? Here, as before, the voters cannot be blamed at all. If state law provides that a driver’s license is a valid form of voter ID whether it contains a current address or not, the voter is entirely entitled to submit that form of ID. It is the local official who incorrectly rejects it based on a misreading of the state law.

Presumably, however, this situation would not arise in the context of a court-ordered statewide recount, as the judiciary would insist on a correction of this local mistake. That point might be enough for Hercules to distinguish this case from the emerging *Bush v. Gore* principle if he determined that it made sense to limit the principle to circumstances involving court-ordered

recounts. But what if a state's election procedures do not permit court-ordered recounts—and fail to provide any other kind of remedy for correcting this discriminatory disenfranchisement because of the misreading of state statutes in some localities?<sup>83</sup> Would Hercules really conclude that no Equal Protection violation should be recognized in this situation, even after accepting the applicability of the *Bush v. Gore* precedent to the other ID-related fact pattern? (Remember, considering the path-dependent incrementalism of judicial reasoning based on precedents, we are assuming for the moment that the somewhat easier ID case was decided first, setting the stage for the next one.)

In both situations, state law would permit the local rejection of votes for lack of adequate ID when the exact same ID would result in those votes being counted elsewhere in the state. Although the reasons for the local variance in what officials deem acceptable ID are different in the two situations—mistake in one, interpretation in the other—the result is the same: discriminatory disenfranchisement at the hands of local officials.

But if Hercules does accept the Equal Protection claims in both these situations, then why not accept the claims when the mistake local officials make is not misreading state law, but failing to provide adequate electoral resources to local precincts, especially when the mistake prevents voters from casting ballots altogether, as when the supply of provisional ballots runs out? Yet, now Hercules appears on the proverbial slippery slope. Would Hercules, for example, really find an Equal Protection violation if administrative errors cause the lines at some polling places to last 15 minutes or a half-hour longer than elsewhere?

Being Hercules, he may be able to handle the slippery slope problem in a principled way, distinguishing the appropriately winning Equal Protection claim from the one that simply goes too far.<sup>84</sup> Mere mortals like ourselves,

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<sup>83</sup> Unless a state legislature has enacted a statute giving courts explicit authority to remedy a mistake in the vote-counting process, the prevailing view among state courts is that they are powerless to act, as the common law provided no such remedy. See Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. (forthcoming 2007). In fact, Ohio has repealed its statutory authority for state court review of vote-counting mistakes in federal elections, requiring litigants to rely solely upon whatever remedies might be available in federal court or before Congress. See OHIO REV. CODE ANN. § 3515.08(A) (LexisNexis Supp. 2006), enacted as part of H.B. 3 (2006):

The nomination or election of any person to any federal office, including the office of elector for president and vice president and the office of member of congress, shall not be subject to a contest of election conducted under this chapter. Contests of the nomination or election of any person to any federal office shall be conducted in accordance with the applicable provisions of federal law.

<sup>84</sup> Cf. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

however, have trouble seeing the principled line that he may be able to discern, especially in advance of the actual case in which the dividing line gets drawn. The marginal cases, close to either side of the principled dividing line, are likely to be particularly fact-sensitive, where minor changes in the evidence in the record might push the case over to the other side of the line. Thus, the Herculean effort to identify the correct stopping point on the slippery slope is dependent on the crucible of litigation, for reasons we have seen previously, and thus cannot be identified in advance (even in principle). Furthermore, because of path-dependency, the location of the correct stopping point may depend on whether, among cases within the marginal zone, a stronger or weaker case is resolved first.

#### 4. *Hercules as Quixote?*

Perhaps some “theoretical assent” would shed some light on this slippery slope problem, which we can imagine Hercules confronting. As both Dworkin and Sunstein acknowledge, the ideal judge will begin to think more theoretically about the case at hand when focusing closely on the facts does not yield a ready answer. Since Hercules is likely to be uncertain about where to draw the line in a case within the marginal zone, even after the crucible of litigation has fixed the factual record for him, he presumably will need to think more theoretically about the Equal Protection principle that the line of cases starting with *Bush v. Gore* is endeavoring to protect.

Thanks to the work of constitutional scholars already, there are at least three different ways to understand the *Bush v. Gore* principle. For the sake of convenience, these three alternatives have been labeled—from narrowest to broadest—the First Amendment, Due Process, and Equal Protection understandings of *Bush v. Gore*. These labels, however, are a bit misleading, because all three require inequality in the treatment of voters to establish a valid claim, and all three are tied to the Equal Protection Clause. The first two alternatives, however, are subsets of the broadest possible “equality” understanding of *Bush v. Gore* by claiming that cases must show an additional constitutional injury—either of the First Amendment or the Due Process kind—in order to trigger an Equal Protection violation as a result of differential treatment of voters.

The First Amendment alternative ties itself to the presence of excessive administrative discretion as a result of vague laws—and thus would limit meritorious claims to the first category we have considered, involving insufficiently specific standards.<sup>85</sup> It is derived from a set of First

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<sup>85</sup> My Moritz colleague Dan Tokaji is a leading proponent of this First Amendment alternative, which he accurately characterizes as “First Amendment Equal Protection” to indicate that it is a distinct species of Equal Protection law based on First Amendment

Amendment cases in which parade permits and other opportunities for free expression were denied by local officials pursuant to imprecise rules that enabled these officials to discriminate among speakers based on hostility to particular viewpoints. This First Amendment gloss on *Bush v. Gore* sees a parallel between this kind of viewpoint discrimination among speakers and the discrimination among ballots to be counted because of partisan favoritism.

The Due Process reading of *Bush v. Gore* would encompass this first category of claims, based on insufficiently specified standards, and would extend to the second category as well, involving mistaken implementations of state law. This Due Process alternative seeks to protect voters from having their ballots arbitrarily discarded without any kind of appropriate procedures or consideration.<sup>86</sup> The rejection of some ballots because some local officials could not read the relevant state law correctly, and thereby misbelieved that a driver's license must contain a current address to qualify as valid voter ID, surely would count as a kind of arbitrary denial of the fundamental right to vote that would contradict the Due Process reading of *Bush v. Gore*.

The so-called Equal Protection theory, the broadest, would encompass claims recognized by both the First Amendment and Due Process alternatives, but also go further to invalidate any unjustifiable local variations in voting opportunities.<sup>87</sup> Thus, it would extend beyond the first two categories of claims, those based on excessive discretion or mistake, to embrace claims in the third category, and perhaps even the fourth as well. Rather than being limited to any *type* of inequality among eligible voters in the counting (or even casting) of ballots—or, perhaps more precisely, in the *type of administrative decision* that causes this electoral inequality (discretionary interpretation, misinterpretation, resource misallocation, and so forth)—this Equal Protection reading of *Bush v. Gore* would distinguish meritorious from unmeritorious claims based on the *severity* of electoral

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values. See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409 (2003). My former co-clerk Abner Greene has also propounded a version of this alternative: Greene, *supra* note 71, at 1654–96.

<sup>86</sup> See Einer Elhauge, *The Lessons of Florida 2000*, POL'Y REV., Dec. 2001 & Jan. 2002, at 15; Roy A. Schotland, *In Bush v. Gore: Whatever Happened to the Due Process Ground?*, 34 LOY. U. CHI. L.J. 211 (2002).

<sup>87</sup> See, e.g., Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 395 (2001) (describing how, if the Equal Protection principle were taken seriously, it would invalidate different voting technologies in different counties). See also Clifford A. Jones, *Out of Guatemala?: Election Law Reform in Florida and the Legacy of Bush v. Gore in the 2004 Presidential Election*, 5 ELECTION L.J. 121, 136 (2006); Saphire & Moke, *supra* note 11; Note, "Arbitrary and Disparate" Obstacles to Democracy: The Equal Protection Implications of *Bush v. Gore* on Election Administration, 19 J.L. & POL. 299 (2003).

inequality, balanced against the strength of the government's *justification* for the administrative practice that causes this inequality.

Is it possible to identify which of these three alternatives Hercules would adopt as his own view of the best theoretical understanding of *Bush v. Gore*? Not by reading the academic literature on the topic, as all three alternatives have their professorial proponents. One would have to enter this scholarly debate in order to argue why the alternative one prefers is, in truth, the objectively correct way to read *Bush v. Gore*. But one should not be so presumptuous to think that one's arguments, however convincing to oneself, will yield academic accord on the topic.

For myself, I am quite torn between the Due Process and Equal Protection alternatives. I find the First Amendment reading, although intellectually sophisticated and creative, arbitrarily narrow. Narrowness is its strongest virtue, as anyone predisposed to think *Bush v. Gore* was wrongly decided as an Equal Protection case would be inclined to favor the narrowest way to understand the principle emanating from that precedent. It is not clear to me, however, why distinctive freedom-of-expression concerns should be controlling with respect to the unequal treatment in the casting of ballots by equally eligible citizens. To be sure, casting a ballot has an expressive element to it and thus is worthy of First Amendment protection. But the constitutional protection of equality in voting extends to circumstances that do not depend on the expressive nature of voting. After all, there is no need for the doctrine of *Reynolds v. Sims*, with its requirement of equally populous legislative districts, in order to protect the expressive dimension of casting a ballot. The vote in favor of a candidate *expresses* the voter's support for that candidate to the same extent, whether that candidate *represents* a district of one thousand or one million.<sup>88</sup>

Likewise, the harm to electoral equality from insufficiently specified state standards extends beyond the distinctive First Amendment concern of viewpoint discrimination, or partisan bias, resulting from the discretionary interpretation of those imprecise standards. Even when local election boards are structured in a strictly bipartisan way, with equal numbers of Democrats and Republicans (as in Ohio), there is the problem of some local boards adopting a stricter interpretation of an imprecise statewide standard, while other local boards opt for a more lenient interpretation. The eligible voters whose provisional ballots are rejected because their local board checked only its computerized records, whereas provisional voters elsewhere benefited from the willingness of their boards to double-check original registration

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<sup>88</sup> Indeed, this proposition is considerably stronger than the analogous one that the Court accepted in *Buckley v. Valeo*: that a \$1000 contribution to a candidate's campaign expresses support for that candidate to roughly the same extent as a \$1 million contribution. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

forms, are denied a basic equality of electoral participation regardless of the risk that the local boards adopted their differing interpretations of the imprecise state rule because of local partisan biases. The First Amendment reading of *Bush v. Gore* does not capture the real reason for protecting equally eligible voters from discriminatory disenfranchisement caused by local variation in the interpretation of insufficiently specific statewide standards.<sup>89</sup>

For similar reasons, it is tempting to say that the Equal Protection reading of *Bush v. Gore*, or at least some suitably cautious version of it, must be the correct one. Equality of opportunity for all equally eligible citizens to cast a ballot that counts is, after all, the democratic value that animates this exercise in constitutional interpretation. That electoral equality can be fully vindicated only through an Equal Protection interpretation of the Equal Protection Clause.

The problem, however, is that this Equal Protection reading of *Bush v. Gore* is the most unbounded, leaving the most room for variability in judicial reasoning in each new case. The Equal Protection inquiry, at least so far as it has been identified in precedents up to this point, is to balance the severity of the inequality against the strength of the government's justification for its administrative practice. This amorphous balancing test, entirely dependent on the facts of each case, engenders unpredictability in an area of law that arguably is in special need of clear rules in advance: the rules and procedures for counting votes should be set in stone, insofar as humanly possible, before the votes are cast.

This problem does not disappear even if judges exercise considerable self-restraint when employing this Equal Protection balancing test. We can imagine judges adopting a presumption against invalidating administrative practices based on this Equal Protection interpretation, limiting judicial intervention to cases of egregious inequalities where the government's justifications are weak. Still, if the test for judicial intervention turns on such indeterminate factors as *egregiousness* or *weakness*, there will be many cases in which it is uncertain whether or not this test is met.

The Due Process reading of *Bush v. Gore* has the advantage of providing some more constraint, and therefore predictability, to the scope of its principle. To be sure, the test for a Due Process violation is also malleable, focusing on the *arbitrariness* of the administrative practice. But it also

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<sup>89</sup> To be sure, where local election boards are not structured in a strictly bipartisan way, the risk of local partisanship exists with respect to the treatment of provisional ballots, just as it did in the Florida recount situation. See *supra* note 82. The point here is that equivalently eligible provisional voters, some of whose ballots are rejected only because of local variation in the extent of their verification procedures, should receive the benefit of the same Equal Protection principle, even if the structure of a state's local election boards is not inherently partisan.

purports to cabin judicial intervention to those circumstances in which electoral administration has been *procedurally* defective. If this Due Process approach prevails, it would not be enough to say that the discriminatory treatment of voters with respect to the casting or counting of ballots was *substantively* unfair. Rather, it would be necessary to claim that this discriminatory treatment resulted from an administrative decision or practice that was flawed in some procedural way.

Whether the benefits of cabining the *Bush v. Gore* principle in this way outweigh the costs is difficult, if not impossible, to say in advance of actual cases—even though it would be desirable to settle this issue in advance. It is hard to know in advance what claims the Equal Protection alternative would find meritorious that the Due Process alternative would not, or how important to the vindication of constitutional values it would be to provide relief to these particular claims. Thus, the crucible of actual litigation seems necessary, not only to set the factual record upon which the *Bush v. Gore* principle will be applied, but also to make a definitive judgment about which alternative understanding of that principle should be chosen to apply to that factual record.

When this theoretical uncertainty is added to the others that we have considered, including the path-dependent development of decisional law, the effort to speculate about how Hercules would handle the slippery slope of potentially meritorious *Bush v. Gore* claims seems ultimately quixotic.

#### D. *How Would Actual Justices Decide New Bush v. Gore Claims?*

Hercules does not sit on the Supreme Court. Flesh-and-blood humans do. Therefore, in thinking about the future of *Bush v. Gore*, maybe we would do better to consider what the Justices themselves are likely to do, if they were to confront the merits of a new *Bush v. Gore* claim.

Doing so, however, compounds the challenge in at least one respect: because there are nine Justices who may have different views on how to apply the Equal Protection precedent of *Bush v. Gore* in future cases, it is necessary to consider each of the Justices individually, or at least paired with those other Justices likely to share their perspective on the matter. When combined with the wide array of potential fact patterns presenting novel *Bush v. Gore* claims, the challenge of predicting how each individual Justice would rule on each of these claims becomes essentially impossible. Yet simply to get a feel for whether *Bush v. Gore* has any future at all as a precedent for the recognition of new Equal Protection claims, it is worth speculating about how each Justice might rule if faced with the strongest claim we have identified: local variation in the verification of provisional



ballots caused by insufficiently specific statewide standards on what registration records local officials must check.<sup>90</sup>

### 1. *Justices Stevens & Ginsburg*

Justices Stevens and Ginsburg did not find an Equal Protection violation in *Bush v. Gore* itself, and thus one might think they would be disinclined to extend that precedent or even willing to overrule it. Yet both these Justices might be more sympathetic to the Equal Protection claim in the provisional ballot case for a reason discussed above: the provisional voters whose ballots are rejected in this situation are in no way responsible for the discriminatory disenfranchisement they suffer, whereas the voters in *Bush v. Gore* could have prevented their problem by detaching their chads as instructed. In that sense, the *Bush v. Gore* voters had a full opportunity to cast a ballot that would have been counted, so they were not completely disenfranchised in the same way that the provisional voters in this situation are.

Unlike in *Bush v. Gore*, moreover, there is no doubt about the electoral choice these eligible voters made when casting their provisional ballots. There would be no obstacle to, or indeed basis for, rejecting these ballots if only local officials had taken the same steps to check their registration records as officials elsewhere in the state. This outright disenfranchisement of some eligible voters might strike Justices Stevens and Ginsburg as akin to the discriminatory disenfranchisement in *Harper v. Virginia State Board of Elections*,<sup>91</sup> the Poll Tax Case, and thus much more deserving of a remedy than the varying interpretations of ambiguous ballots in *Bush v. Gore*.

Indeed, Justice Stevens has since suggested as much in an opinion he issued on Election Day in 2004.<sup>92</sup> The case concerned the threat of widespread partisan challenges to the eligibility of targeted voters at polling places. Although Justice Stevens refused an emergency request to intervene in the case just several hours before polls were about to open, he went out of his way to express his “faith that the elected officials . . . will carry out their responsibilities in a way that will enable qualified voters to cast their

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<sup>90</sup> Some observers have speculated that the Supreme Court will never cite *Bush v. Gore* as a precedent, perhaps out of embarrassment. See, e.g., Adam Cohen, *Has Bush v. Gore Become the Case That Must Not Be Named?*, N.Y. TIMES, Aug. 15, 2006, at A18; Chad Flanders, *Please Don't Cite This Case! The Precedential Value of Bush v. Gore*, 115 YALE L.J. POCKET PART 141 (2006), <http://thepocketpart.org/2006/11/07/flanders.html>. My view, however, is different. The absence of citation to *Bush v. Gore* thus far is evidence only of the fact that no new case before the Supreme Court has yet directly implicated that precedent. The true test will come when one does.

<sup>91</sup> 383 U.S. 663 (1966).

<sup>92</sup> *Spencer v. Pugh*, 543 U.S. 1301 (2004) (Stevens, Circuit Justice).

ballots.”<sup>93</sup> It would seem that the failure of some election officials to take the steps that would verify a provisional voter’s eligibility, when election officials elsewhere in the state were willing and able to take those same steps, would amount to a breach of this faith.

Thus, had *Bush v. Gore* never occurred, and were this discriminatory disenfranchisement of provisional voters before the Supreme Court, Justices Stevens and Ginsburg would likely find an Equal Protection violation, relying on *Harper* and related Warren Court precedents.<sup>94</sup> It is conceivable, although unlikely, that these Justices would let the intervening existence of *Bush v. Gore* undercut the Equal Protection claim they otherwise would recognize. These real world Justices, like the hypothetical Hercules, are sensitive to path-dependency. Even so, whatever negative shadow *Bush v. Gore* would cast over this new Equal Protection claim involving provisional ballots would seem pale in comparison with the strength of the claim itself. After all, *Bush v. Gore* accepted rather than rejected the Equal Protection claim there, and while Justices Stevens and Ginsburg objected to that ruling, their hostility to the Equal Protection holding in *Bush v. Gore* would not seem so great as to cause them to deny another Equal Protection claim they would sustain independently of that precedent.<sup>95</sup>

Furthermore, Justices Stevens and Ginsburg are not averse to relying on precedents with which they originally disagreed when doing so suits their purposes. Justice Stevens, for example, has relied extensively on *Shaw v. Reno*,<sup>96</sup> an Equal Protection holding he especially objected to, to support his own position in the related, but different, context of political rather than racial gerrymandering.<sup>97</sup> And Justice Stevens, writing for himself and Justice

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<sup>93</sup> *Id.* at 1302–03.

<sup>94</sup> See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>95</sup> Indeed, Justice Stevens’s dissent in *Bush v. Gore* acknowledged some sympathy towards the Equal Protection claim in the case even though he ultimately found it unmeritorious. “Admittedly,” he said, “the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns.” *Bush v. Gore*, 531 U.S. 98, 126 (2000) (Stevens, J., dissenting). He went on to say, however, that the presence of a “single impartial magistrate” in the recount context “alleviated—if not eliminated [these concerns],” and that there needs to be some flexibility in applying the Equal Protection Clause to the problems of voting administration lest all electoral inequalities in practice end up federal constitutional violations. *Id.* This reasoning hardly indicates adamant hostility towards the Equal Protection holding in *Bush v. Gore*.

<sup>96</sup> 509 U.S. 630 (1993).

<sup>97</sup> In his dissent in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), after quoting *Shaw* and *Miller v. Johnson*, 515 U.S. 900 (1995), the case extending *Shaw* to racially motivated maps that are not superficially anomalous, Justice Stevens asserted: “In my view, the

Ginsburg in *Clingman v. Beaver*<sup>98</sup> to support a political party's right to free association, invoked the authority of *California Democratic Party v. Jones*,<sup>99</sup> a case in which they together dissented. Thus, we can surmise that both Justice Stevens and Justice Ginsburg would be quite comfortable citing *Bush v. Gore* to uphold an Equal Protection claim they wish to vindicate.<sup>100</sup>

## 2. Justices Souter & Breyer

Justices Souter and Breyer agreed with the Court in *Bush v. Gore* that the differential treatment of dimpled and punctured chads presented an Equal Protection problem (although Justice Breyer at least did not go quite so far as to say that this Equal Protection "problem" amounted to an Equal Protection violation).<sup>101</sup> They based their dissents, however, on the Court's remedy,

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same standards should apply to claims of political gerrymandering, for the essence of a gerrymander is the same regardless of whether the group is identified as political or racial." *Vieth*, 541 U.S. at 335 (Stevens, J., dissenting). See also *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2642 (2006) [hereinafter *LULAC*] (Stevens, J., concurring in part, dissenting in part) (noting, with regards to the dismantling of District 24, "I would apply the standard[s] fashioned by the Court in its racial gerrymandering cases").

<sup>98</sup> 544 U.S. 581, 612–13 (2005) (Stevens, J., dissenting). See also *id.* at 615 (specifically citing *Jones* for the proposition that "it is no business of the State to tell a political party what its message should be, how it should select its candidates, or how it should form coalitions to ensure electoral success," a proposition that he rejected in *Jones* itself).

<sup>99</sup> 530 U.S. 567 (2000).

<sup>100</sup> Jan Crawford Greenburg asserts in her new book: "The Court's liberal justices still believe *Bush v. Gore* was a political decision, and they privately question whether the outcome would have been the same if it had been *Gore v. Bush*, with the Republican candidate calling for the recount." JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 31 (2007). It is difficult to know what to make of this assertion, in part because Greenburg does not attribute this belief to any "liberal" Justice by name or provide any further details. Moreover, this assertion contradicts previous suggestions that *Bush v. Gore* dissenters on the Court had reconciled themselves to the decision and moved on to tackle other cases and issues. See, e.g., Joan Biskupic, *Bush v. Gore: Filed, Not Forgotten*, USA TODAY, Dec. 13, 2001, at A3:

The nine justices appear to have moved past the tension created by the 5-4 decision and have moved into a new term. . . . The justices who mentioned *Bush vs. Gore* in speeches this year—either to defend or criticize the ruling—now say privately that it causes little tension among them today.

*Id.* See also Greenhouse, *supra* note 70. In any event, even if this assertion were true, it would not undermine the observation that Justices Stevens and Ginsburg likely would be willing to use the precedent to support an interpretation of the Equal Protection Clause with which they agreed.

which shut down Florida's attempt to recount the ballots on the eve of the congressional "safe-harbor" deadline for settling disputes concerning a state's Electoral College delegation.<sup>102</sup> Thus, these two Justices might have little hesitation in extending the Equal Protection precedent of *Bush v. Gore* to a case involving the discriminatory disenfranchisement of provisional voters, especially if this new provisional voter case arose in a context divorced from the "safe-harbor" deadline of a presidential election (as it easily could have in the 2004 gubernatorial election in Washington).

### 3. Justices Scalia & Thomas

Justices Scalia and Thomas joined the Court's opinion in *Bush v. Gore* that found the Equal Protection violation, but there is reason to think that they might be reluctant to rely on it and might even be willing to repudiate it. Justice Scalia is rumored to have disparaged the Equal Protection reasoning of the Court's opinion, although he has denied the rumor, saying instead that he simply expressed a preference for the Article II alternative in Chief Justice Rehnquist's *Bush v. Gore* concurrence (which both Justices Scalia and

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<sup>101</sup> Souter stated: "I can conceive of no legitimate state interest served by these differ[ent] treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary." *Bush v. Gore*, 531 U.S. 98, 134 (2000) (Souter, J., dissenting). Justice Souter also characterized Bush's Equal Protection argument as "meritorious." *Id.* at 133. Breyer, more tentatively, said, "[T]he absence of a uniform, specific standard to guide the recounts . . . does implicate principles of fundamental fairness . . . I agree that, in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem." *Id.* at 145-46 (Breyer, J., dissenting). Some have suggested that the majority in *Bush v. Gore* distorted the position of these two dissenters by stating that "[s]even Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy." *Id.* at 111 (per curiam). See, e.g., DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* 124 n.i (3d ed. 2004) ("Is the Court correct that [Souter and Breyer] agree that there is a constitutional problem?").

<sup>102</sup> It has been suggested that, during the Court's time-pressured internal deliberations over *Bush v. Gore* on the day of the oral argument (Monday, December 11), Justice Breyer, and perhaps also Justice Souter, expressed support for Bush's Equal Protection argument as a strategic maneuver in the hope that either Justice Kennedy or Justice O'Connor would agree to a remand that would permit a recount to continue. See JEFFREY TOOBIN, *TOO CLOSE TO CALL* 264 (2001) ("Breyer in particular thought he could craft a compromise that might nudge Kennedy, or, less likely, O'Connor, over to his side."); Linda Greenhouse, *Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1 ("Justice Breyer, joined by Justice Souter, was offering this [Equal Protection] option in an effort to sway Justice Kennedy and perhaps Justice O'Connor."). To my knowledge, no one has suggested that this strategy was insincere, with the implication that Justices Breyer and Souter would disavow the Equal Protection concerns they expressed in *Bush v. Gore* if those same concerns were germane in a future case.

Thomas also joined).<sup>103</sup> More recently, however, Justice Scalia has been quoted as defending the Equal Protection holding of *Bush v. Gore*: "Counting somebody else's dimpled chad and not counting my dimpled chad is not giving equal protection of the law."<sup>104</sup>

In any event, the Equal Protection holding of *Bush v. Gore* seems so out-of-step with their approach to the Equal Protection Clause in other election cases that it seems difficult to imagine that Justices Scalia and Thomas would wish to extend that holding even to other cases involving unequal treatment of ballots resulting from insufficiently specific statewide standards, which is the category of claims closest to *Bush v. Gore* itself.<sup>105</sup> The most obvious point of comparison is *Vieth v. Jubelirer*,<sup>106</sup> as well as the follow-up of *LULAC v. Perry*,<sup>107</sup> where Justices Scalia and Thomas insist that the political question doctrine blocks reliance on the Equal Protection Clause because any standard derivable from the Clause would be too imprecise to permit judicial intervention. Imprecision, however, is an unavoidable characteristic of the Equal Protection principle vindicated in *Bush v. Gore*, even if that principle is limited to the narrowest category of insufficiently specified standards that cause local variation in the counting of similar ballots. As we have seen, at the very least, implementing this Equal Protection principle requires case-by-case judgments about whether it would have been "practicable" for state law to adopt a more specific rule, and this practicability standard itself is by no means precise.<sup>108</sup>

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<sup>103</sup> Tony Mauro, *Scolding Scalia*, LEGAL TIMES, Sept. 13, 2004, at 3.

<sup>104</sup> Glenn Blain, *Scalia, Speaking at Iona, Defends Decision to Halt 2000 Florida Recount*, J. NEWS, Jan. 24, 2007, at 1B. Justice Scalia's comment came during a Q&A session after a speech he delivered. The original report was picked up by the Associated Press and republished widely.

<sup>105</sup> Cf. Richard L. Hasen, *No Exit?: The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 686 (2006):

While we do not know how the Supreme Court will resolve these kinds of claims if and when they are considered, a Supreme Court made up of a conservative majority is unlikely to read the Equal Protection Clause expansively so as to open up the courts to many Equal Protection challenges to the nuts and bolts of elections. Indeed, it was this instinct that a conservative Court would not read the Equal Protection Clause expansively which made the holding of *Bush v. Gore* so surprising.

<sup>106</sup> 541 U.S. 267 (2004) (plurality).

<sup>107</sup> 126 S. Ct. 2594 (2006) (Scalia, J., dissenting in part).

<sup>108</sup> It has been suggested by one reader that the problem of indeterminacy in the gerrymander context is qualitatively different from the Equal Protection holding of *Bush v. Gore* because in the gerrymander context there is not even an identifiable standard to apply, whereas *Bush v. Gore* merely involves the application of a fuzzy standard. That suggestion, however, is incorrect. In *Vieth*, Justice Scalia acknowledges that Justice

Similarly, this Equal Protection principle appears to require an inquiry into whether the statewide standard that causes local variation is *unspecific enough* to trigger a federal constitutional problem. A modest amount of vagueness in the statewide standard might be constitutionally tolerable, even if it might be “practicable” to reduce the degree of vagueness somewhat more. On this view of the Equal Protection principle, degree-of-vagueness would be a kind of threshold inquiry, which the complainant would need to overcome, in order to advance to the “practicability” inquiry. Alternatively, degree-of-vagueness and practicability might be commingled inquiries, only causing the overall Equal Protection principle to be that much more imprecise itself. Either way, this Equal Protection principle has the same sort of indeterminacy as the “undue burden” test of *Planned Parenthood v. Casey*<sup>109</sup> or the “congruence and proportionality” test of the Court’s cases interpreting Section Five of the Fourteenth Amendment.<sup>110</sup> Justices Scalia and Thomas are especially averse to these kinds of indeterminate constitutional tests, and although the *Bush v. Gore* principle (on this narrowest understanding) is directed against inappropriate indeterminacy in state law, the use of an indeterminate constitutional test to invalidate imprecise state statutes would presumably strike Justice Scalia and Thomas as improper judicial usurpation of legislative prerogatives. Especially in the politically sensitive sphere of voting administration, Justices Scalia and Thomas would ordinarily say that if the Court itself can do no better than the legislature in articulating clear rules, then the Court should invoke the political question doctrine to keep its hands off.

What, then, would Justices Scalia and Thomas ultimately do if forced to rule on the merits of the strongest possible claim that might arise under the precedent of *Bush v. Gore*, again the case of discriminatory rejection of provisional ballots resulting from different local interpretations of an indisputably vague verification standard that easily could have been more precise (“local officials must check original registration cards as well as computerized records”)? This one seems especially difficult to predict. On the one hand, they might go along with the finding of an Equal Protection violation in this case, accepting the Equal Protection ruling in *Bush v. Gore* as not worth overruling. If they saw this provisional ballot case as clearly

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Breyer’s dissent offers a normatively attractive principle for identifying unconstitutional gerrymanders: those that undemocratically deprive the majority of their right to control a state’s legislative process. Justice Scalia, however, rejects Justice Breyer’s approach because it fails operationally to determine when a gerrymander’s impendence of majority rule is sufficiently severe to warrant judicial invalidation. In this respect, the indeterminacy of Justice Breyer’s anti-entrenchment principle is qualitatively similar to the indeterminacy of *Bush v. Gore*.

<sup>109</sup> 505 U.S. 833, 837 (1992) (Scalia, J., dissenting).

<sup>110</sup> See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 520–21 (2004) (Scalia, J. dissenting).

coming within the scope of the Equal Protection holding in *Bush v. Gore*, no matter how inappropriately indeterminate that Equal Protection holding may be, then they could accept the finding of an Equal Protection violation in this provisional ballot case without viewing it as really being an *extension* of *Bush v. Gore* at all. But they might try to say that the discriminatory rejection of provisional ballots is different in principle from the discriminatory rejection of dimpled or punctured chads, as difficult (and apparently un-Herculean) as doing so would be on these particularly compelling facts (again, no fault of these eligible voters that their valid registrations were missing from computerized records). Or perhaps these two Justices might disavow the Equal Protection ruling of *Bush v. Gore*, acknowledging that they should have joined just the separate Article II concurrence.

But if Justice Scalia's recent defense of the Equal Protection holding is accurate, as quoted in the media, then he would seem prepared to apply this holding to analogous circumstances, like the provisional ballot case.

#### 4. Justices Roberts & Alito

Chief Justice Roberts and Justice Alito, of course, were not on the Court at the time of *Bush v. Gore*. Therefore, it is difficult to assess their receptivity to Equal Protection claims based on that precedent. During their confirmation hearings, however, they indicated that they would respect the Equal Protection holding of *Bush v. Gore* under the doctrine of *stare decisis*. In a written response to a question from Senator Kennedy, Chief Justice Roberts went so far as to say that "the Equal Protection principles at issue in *Bush v. Gore* may be implicated in future cases" and that the cautionary language of the Court's opinion there, in his view, "was not meant to deprive the decision of all precedential weight."<sup>111</sup> Presumably, then, Chief Justice Roberts would be prepared to apply the authority of *Bush v. Gore* in a case that he saw falling within the scope of its holding, even narrowly understood.

To be sure, neither Chief Justice Roberts nor Justice Alito said anything in the context of their confirmation hearings that would preclude either of them from overruling *Bush v. Gore* if, based on their best judgment at the time, a specific case came before them on the Supreme Court and they determined that the justifications for doing so outweighed the respect for

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<sup>111</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States, Before the S. Judiciary Comm.*, 109th Cong. 631 (2005). In response to a question from Senator Kohl during his own hearing, Justice Alito similarly stated: "[T]he Equal Protection ground that the majority relied on in *Bush v. Gore* does involve principles that could come up in future elections and in future cases." *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States, Before the S. Judiciary Comm.*, 109th Cong. 386 (2006).

precedent demanded by *stare decisis*. But the general concern that Chief Justice Roberts has expressed that the Court's decisions appear objective and grounded in the rule of law would suggest that he would not easily agree to overrule *Bush v. Gore* as an arbitrary and capricious mistake.<sup>112</sup> Consequently, if the kind of provisional ballot case that we have been considering came before the Court on the merits (presumably after a grant of certiorari by at least four of the Justices), we can expect that Chief Justice Roberts would rule in favor of sustaining the Equal Protection claim on the authority of the *Bush v. Gore* precedent. Justice Alito would be likely to do the same, both because he appears to share the Chief Justice's general jurisprudential perspectives and because he might be inclined to follow the Chief's lead in a case as institutionally significant as one involving the precedential status of *Bush v. Gore*.

### 5. Justice Kennedy

That leaves Justice Kennedy, the purported primary author of the majority opinion in *Bush v. Gore* (although it was issued *per curiam*).<sup>113</sup> That attribution makes sense as its reasoning and style are characteristic of his other opinions, including those involving the application of the Equal Protection Clause to election cases. For example, in *LULAC v. Perry* he rejects the plaintiff's proposed test for political gerrymanders using language that echoes the condemnation of the recount process in *Bush v. Gore*.<sup>114</sup>

As the author of the majority opinion in *Bush v. Gore*, Justice Kennedy would be particularly predisposed in a future case to show that precedent to be principled. Even assuming that he only shares responsibility with Justice O'Connor for the majority opinion in *Bush v. Gore*, Justice Kennedy still would want the world to see that the decision there was not an ad hoc contrivance to award the presidency to George W. Bush, but rather a principled interpretation of the Equal Protection Clause that can benefit other

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<sup>112</sup> Transcript of Chief Justice John G. Roberts's remarks at the Fair and Independent Courts Conference at Georgetown University (Sept. 28, 2006), <http://www.law.georgetown.edu/news/documents/CoJ092906-roberts.pdf>; Joanna Suarez, *Lecture Series—Chief Justice Roberts*, [http://www6.miami.edu/UMH/CDA/UMH\\_Main/0,1770,8543-1;51457-3,00.html](http://www6.miami.edu/UMH/CDA/UMH_Main/0,1770,8543-1;51457-3,00.html).

<sup>113</sup> See, e.g., Jeffery Rosen, *In Lieu of Manners*, N.Y. TIMES MAG., Feb. 4, 2001, at 46, 50. See also Toobin, *supra* note 102, at 265 (noting that "the wording was mostly Kennedy's"); GREENBURG, SUPREME CONFLICT, *supra* note 100, at 176 (describing how Court's opinion was "Kennedy's handiwork").

<sup>114</sup> Compare *Bush v. Gore*, 531 U.S. 98, 107 (2000) (*per curiam*) ("This is not a process with sufficient guarantees of Equal Protection.") with *LULAC*, 126 S. Ct. 2594, 2602 (2006) ("A test that treats these two similarly effective power plays in such different ways does not have the reliability [that] appellants ascribe to it.").



plaintiffs—Democratic or Republican—in analogous circumstances. Thus, more than any other member of the Court, Justice Kennedy would likely be supportive of an Equal Protection claim in a case like the provisional ballot one that we have been considering.

### 6. *Adding Up the Votes on the Supreme Court*

Our review of the individual Justices reveals that there might even be a unanimous vote in favor of recognizing a valid Equal Protection claim in this kind of provisional ballot case. Perhaps unanimity should not be surprising in a case involving the strongest imaginable claim based on the precedent of *Bush v. Gore*. Such unanimity would certainly please Chief Justice Roberts, who has been cajoling his colleagues to sublimate their own personal views about the right answer in each case (their own efforts to play Hercules?) out of deference to the authority of the Court itself as an institution.<sup>115</sup>

As our review of the individual Justices has also shown, however, unanimity is far from certain in even this strongest possible case based on *Bush v. Gore*. Justices Scalia and Thomas might dissent, as conceivably could Justices Stevens and Ginsburg, or even Chief Justice Roberts or Justice Alito. Of course, if all of these Justices voted to overrule *Bush v. Gore*, or to reject the new Equal Protection claim because provisional ballots are distinguishable from dimpled and punctured chads (for some not-readily-apparent reason), then the Court's vote would be 6-3 against the claim. But the most likely outcome, based on our prognostications, would be a 9-0, or perhaps a 7-2, vote in favor of this kind of claim.

### 7. *How Far Would the Current Court Extend Bush v. Gore?*

Assuming that this analysis of the current Justices on the Supreme Court is correct, and we can identify one kind of claim premised on the precedent of *Bush v. Gore* that a majority of these Justices would likely accept, the speculation (as with Hercules) becomes: what about the next possible fact pattern along the continuum between those closest and farthest to *Bush v. Gore* itself? The case of locally divergent interpretations of what qualifies as a "current" ID, which also causes unequal counting of identical ballots, seems close enough to the first case, as well as to *Bush v. Gore* itself, that a majority of the Court presumably would also sustain this claim, perhaps again even unanimously.

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<sup>115</sup> Tony Mauro, *Roberts Takes His Time in Reshaping Supreme Court*, N.Y. L.J., Dec. 27, 2006, at 1. See also Tony Mauro, *Scalia, Breyer Debate Unanimity on the High Court*, LEGAL INTELLIGENCER, Dec. 14, 2006, at 4.

But what about the case of discriminatory disenfranchisement caused by local misinterpretations of a state's voter ID law? Or a case of discriminatory disenfranchisement because of local mismanagement in failing to supply precincts with adequate numbers of provisional ballots? Although one cannot be certain, one surmises that (after Justices Scalia and Thomas) Chief Justice Roberts and Justice Alito would be the ones most ready to distinguish *Bush v. Gore* and limit that precedent to a narrow category of cases. This surmise stems from their general preference for judicial restraint in cases involving the application of the Equal Protection Clause to state election procedures. Their position in *LULAC*, rejecting the political gerrymander claim there, accords with this general posture. Therefore, along with Justices Scalia and Thomas, these two would be the ones most inclined to say that the Equal Protection principle of *Bush v. Gore* has no applicability outside the context of a court-ordered recount, even if the consequence is to leave unremedied discriminatory disenfranchisements caused by local administrative errors. (But Justice Scalia's tantalizing recent quote suggests otherwise: to paraphrase what he said only slightly, *counting someone else's ballot submitted with a driver's license that has an old address, and not counting my ballot submitted with a driver's license that has an old address, is not giving equal protection of the law.*)

In fact, Justice Kennedy might be more inclined to narrow the scope of *Bush v. Gore* in this way than any of the dissenters there. As we have seen, the majority opinion itself emphasized the fact that the Equal Protection issue arose in the context of a court-ordered recount. Thus, as its primary author, Justice Kennedy might easily see it as consistent with that opinion to confine its principle to the unequal counting of ballots caused by insufficiently specific standards in the context of a court-ordered recount.

By contrast, despite their dissenting votes in *Bush v. Gore*, Justices Stevens and Ginsburg (and especially Justices Souter and Breyer) might be unwilling to let stand unredressed the discriminatory disenfranchisement of eligible voters as a result of local administrative errors. Such arbitrary and unjustified inequality, especially with respect to so fundamental an interest as the ability of eligible citizens to cast a ballot that counts, would seem inconsistent with Justice Stevens's general interpretation of the Equal Protection Clause as imposing upon the states a duty to govern impartially.<sup>116</sup> As the other *Bush v. Gore* dissenters can be understood to share with Justice Stevens this general approach to the Equal Protection Clause, even if they

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<sup>116</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 327 (2004) (Stevens, J., dissenting); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

might not express it in the same way in every case, they also would be likely to invalidate discriminatory disenfranchisements caused by local mistakes.<sup>117</sup>

To be sure, the *Bush v. Gore* dissenters can hardly be expected to view favorably any claim of local variation in electoral opportunities that might arise in the wake of *Bush v. Gore*. Where local variation results, not from mistake or mismanagement, but from the anticipated implementation of a cogent statewide policy in favor of local discretion, then these Justices—along with the others—can be expected to uphold the local variation as justifiable after being subjected to appropriately rigorous judicial scrutiny under the Equal Protection Clause.<sup>118</sup> For this reason, the claims involving the use of different voting technologies in different localities within a state seem least likely to prevail if they were to come before the current Court. This is true especially where the local choice of different technologies is among options all of which are readily defensible even if not identical (say, between optical scan machines, on the one hand, and VVPAT-equipped touchscreens, on the other).<sup>119</sup> In that situation, the Court's rejection of an Equal Protection claim based on *Bush v. Gore* is likely to be unanimous.

But with respect to cases falling towards the middle of the continuum, like those involving discriminatory disenfranchisement caused by local mistake or mismanagement, Justice Kennedy might well occupy the middle position on the Court, as he did in *LULAC* and will in many other cases given the Court's current composition. As to these middle cases on the *Bush v. Gore* continuum, Justice Kennedy's vote cannot be taken for granted one way or the other. He might vote to narrow his own precedent in the way already suggested, but he also might be pulled in the other direction. Discriminatory disenfranchisement caused by local mistakes or mismanagement might strike him, like Justice Stevens and others, as the kind of arbitrary and unjustified conduct of government that cannot survive even more lenient Equal Protection scrutiny.

Moreover, Justice Kennedy's willingness to sustain an Equal Protection claim might well depend on the particular character of the local error and the particular consequences it has with respect to the ability to cast a ballot that counts. The misreading of a state statute that rejects a ballot for lack of proper ID, when the voter supplied a perfectly acceptable form of ID, might

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<sup>117</sup> See, e.g., *LULAC*, 126 S. Ct. 2594, 2641 (2006). See also *Romer v. Evans*, 517 U.S. 620, 633 (1997) (embracing the "impartiality" perspective of Justice Stevens).

<sup>118</sup> This kind of case would likely be evaluated under a form of intermediate scrutiny. See, e.g., *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992).

<sup>119</sup> For a discussion of different voting technologies, including Voter Verified Paper Audit Trails (VVPATs), see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711 (2005).

seem to Justice Kennedy a more significant error, and one more directly responsible for the disenfranchisement of that voter, than a local misjudgment about the number of voting machines to send to a particular precinct, which has the consequence of excessively long lines, but does not categorically preclude any eligible voter from casting a ballot.

Additionally, Justice Kennedy's willingness to recognize a valid Equal Protection claim in any of these mistake or mismanagement cases may depend on whether it is the first to reach the Court on the merits after *Bush v. Gore* itself. It might be too much of a leap for Justice Kennedy to sustain the mistake-based claim without any additional intervening precedent. But if the Court had already sustained an Equal Protection claim involving the unequal verification of provisional ballots, and had done so unanimously based on the authority of *Bush v. Gore*, the strength of that intermediate precedent might make sustaining a particularly strong mistake-based claim not too big of a step for Justice Kennedy.

Thus, like Hercules, Justice Kennedy can be influenced by path-dependency and, ultimately, is just as difficult to predict.

#### E. *When Will a Case Based on Bush v. Gore Get Before the Court?*

There is no guarantee that the current composition of the Supreme Court will confront the merits of an Equal Protection claim based on *Bush v. Gore*. Indeed, it is quite unlikely this same group of nine will do so. Thus, one cannot assume that Justice Kennedy will continue to be the moderate in the middle, with four on his left and the other four on his right, when this kind of claim is next addressed by the Court.

In fact, there are reasons to think it could take decades rather than years for the Court to grant review in a case requiring it to resolve the merits of an Equal Protection claim invoking the precedent of *Bush v. Gore*. There are some potentially countervailing factors that might cause the Court to review this kind of case, but I would bet against earlier rather than later review. And if this prediction is correct, then all bets are off on how some unknown composition of the Court several decades from now would decide the merits of the case.

##### 1. *Near-term Prognosis for Another Bush v. Gore Claim in the Supreme Court*

As widely expected, the Supreme Court recently denied certiorari in *Wexler v. Anderson*,<sup>120</sup> the Eleventh Circuit case rejecting an Equal Protection challenge to the lack of a paper record in Florida counties using

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<sup>120</sup> 452 F.3d 1226 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 934 (2007).

touchscreen voting machines. In addition to the general considerations that counsel against Supreme Court review in any kind of case—most prominently, the Court's desire to wait until a lower court conflict on the precise issue is fully developed after "percolating" for a while<sup>121</sup>—one can identify extra reasons why the Court would want to avoid a case requiring it to apply the precedent of *Bush v. Gore*. That case was uniquely controversial inside the Court, as well as among audiences that the Justices care most about,<sup>122</sup> and the seven current Justices who participated in that case presumably would resist opening old wounds unless there were a pressing necessity to do so. Furthermore, the especially difficult nature of these Equal Protection issues themselves, a difficulty observed in the *Bush v. Gore* majority itself and echoed by Chief Justice Roberts during his confirmation hearing, provides an added incentive to stay away from this sore subject.

Even if the Court wanted to revisit *Bush v. Gore*, it is unlikely that they will have an opportunity to do so for a while. *Stewart v. Blackwell*, the Sixth Circuit case involving punch-card voting machines, is now moot.<sup>123</sup> *League of Women Voters v. Blackwell*,<sup>124</sup> the important case involving an omnibus challenge to Ohio's voting administration on grounds of widespread inequities caused by massive mismanagement, is likely to settle soon, as Ohio's newly elected Secretary of State and Attorney General have announced.<sup>125</sup> The same is true of other lawsuits pending in Ohio, which present potential *Bush v. Gore*-based claims concerning provisional balloting and voter identification procedures.<sup>126</sup> Prior to the 2008 election, there do not appear to be any other prominent vehicles for taking a *Bush v. Gore* issue to the U.S. Supreme Court.

The Court may soon decide an Equal Protection issue over voter identification rules that does not involve the *Bush v. Gore* precedent. Several important federal court cases are pending that challenge the constitutionality of new voter identification state laws that impose more onerous requirements

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<sup>121</sup> See generally ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, *SUPREME COURT PRACTICE* 247 (8th ed. 2002); Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271 (2006); Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861 (1993). See also Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations of Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135 (2006).

<sup>122</sup> See generally LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

<sup>123</sup> 473 F.3d 692 (6th Cir. 2007).

<sup>124</sup> 432 F. Supp. 2d 723 (N.D. Ohio 2005).

<sup>125</sup> See Niquette & Nash, *supra* note 57.

<sup>126</sup> *Id.*

than had existed previously in those states.<sup>127</sup> A 2-1 decision of the Seventh Circuit, with the majority opinion written by Judge Posner, rejects a challenge of this kind to Indiana's version of this new voter ID legislation.<sup>128</sup> This decision potentially could end up conflicting with contrary appellate decisions in cases arising out of Arizona and other states.<sup>129</sup>

The Supreme Court, even before the 2008 election, might step in to resolve this conflict. But doing so would not require it to address *Bush v. Gore*, as the Equal Protection issue in these voter ID cases is very different from any of the variations on the *Bush v. Gore* theme that we have been considering, including those variations involving voter ID laws. These other ID cases do not allege any local variation in the administration of a state's ID law. Rather, the Equal Protection claim is that the law disenfranchises anyone who is unable to obtain the form of ID required by the statute. (These other ID cases are attacks on the statutes as written, not on how they are

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<sup>127</sup> These cases are included in the Major Pending Case database on the Election Law @ Moritz website. The opening page and chart for this database is <http://moritzlaw.osu.edu/electionlaw/litigation/index.php>. The Voter Identification cases are collected together towards the bottom of the chart, which is organized alphabetically by topic.

<sup>128</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007).

<sup>129</sup> A conflict with the Arizona case is most likely because a Ninth Circuit panel has already signaled its willingness to invalidate that state's ID law, by granting an emergency injunction. *Order, Gonzalez v. Inter Tribal Council of Ariz.*, Nos. 06-16702, 06-16706 (9th Cir. October 5, 2006), *available at* [http://moritzlaw.osu.edu/electionlaw/litigation/documents/06-16706\\_000.pdf](http://moritzlaw.osu.edu/electionlaw/litigation/documents/06-16706_000.pdf), *vacated sub nom. Purcell v. Gonzalez*, 127 S. Ct. 5 (2006). In the Georgia voter ID case, although the federal district court has also issued a preliminary injunction, a state trial court has permanently enjoined that law's enforcement. *Compare Common Cause/Georgia, League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) (most recent preliminary injunction in federal case), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/georgia9-15-06ordergrantingpreliminaryinjunction.pdf>, *with Lake v. Perdue*, No. 2006CV119207 (Ga. Super. Ct. Fulton County filed July 7, 2006) (permanent injunction in state case), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/StateInjunction.pdf>. Therefore, it is less likely that a direct conflict will develop between the Seventh and Eleventh Circuits, although it is still conceivable if the Georgia Supreme Court reverses the state trial court's decision in an appeal that is pending. *See* Brief of Appellant, *Perdue v. Lake*, No. S07A0525 (Ga. Jan. 8, 2007), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Lake-BriefofAppellantsSupremeCt.pdf>. Likewise, there is federal-court litigation pending over the municipal voter ID law in Albuquerque, New Mexico. *ACLU of New Mexico v. Chavez*, No. Civ05-1136 (D. N.M. filed Oct. 27, 2005), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/aclunewmexico.php>. That case on appeal would go to the Tenth Circuit, creating another possible opportunity for a conflict with the Seventh Circuit decision—as also would be true if the Kansas legislature enacts a new voter ID law that has been recently proposed there. Tim Carpenter, *Senator to Propose Voter ID Bill*, TOPEKA CAPITAL-JOURNAL, Jan. 16, 2007, at 1A.

enforced in particular counties or precincts, or whether their enforcement changes over time as a result of varying interpretations or misunderstandings of what the statutes require.) Often, the claim is framed that the newly onerous ID requirement operates as a kind of poll tax because citizens must pay for the underlying documents necessary to get the ID, even if they do not need to pay for the ID itself.<sup>130</sup>

If the Supreme Court does take one of these ID cases, the Court's decision will establish an important new Equal Protection precedent in the area of voting administration. Moreover, given path-dependency and the gravitational force that this important new Equal Protection precedent would exert in nearby situations, this ID decision could end up affecting the Court's consideration of any future claim based on *Bush v. Gore* itself (just as new gerrymandering cases after *LULAC* conceivably could as well). But this new ID decision would not itself involve an application of the *Bush v. Gore* precedent, and thus would not provide a direct answer to any of the various possible *Bush v. Gore*-based permutations that are open questions and potential springboards to future lawsuits.

In the 2008 election itself, a new case may arise over local variation in voting administration that directly raises an issue concerning the scope of the *Bush v. Gore* precedent itself. That much seems likely enough, given the litigation that occurred in 2004 and 2006. It is also possible that the case may be important enough that it demands the Court's immediate attention during the election process itself, just as *Purcell v. Gonzalez* did in 2006. Even so, it is unlikely that the merits of the Equal Protection issue in the case would require the Court's immediate resolution. Rather, it would be more likely that the case would get to the Court in a posture where the Court's ruling concerned a procedural issue, rather than the merits of the constitutional claim itself, as occurred in *Purcell* (as well as in *Spencer v. Pugh*,<sup>131</sup> the 2004 case involving polling place challenges).<sup>132</sup>

It seemingly would take another recount affecting the presidential election to cause the Court in 2008 to address the merits of an Equal Protection claim based on *Bush v. Gore*, but the likelihood of a scenario similar to Florida 2000 seems exceedingly low. After all, before 2000, the country had lasted 124 years without need for Supreme Court intervention to

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<sup>130</sup> For further discussion of these ID cases, see Daniel P. Tokaji, *Leave it to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065 (2007).

<sup>131</sup> 543 U.S. 1301 (2004).

<sup>132</sup> For a discussion of these procedural rulings, see *infra* Part III.

settle the winner of a presidential election.<sup>133</sup> Although *Bush v. Gore* undoubtedly has encouraged lawyers on behalf of presidential candidates to prepare potential lawsuits based on that precedent in the event of another extraordinarily close race,<sup>134</sup> the fact that the outcome of the 2004 presidential election did not fall within the proverbial "margin of litigation" demonstrates the unlikelihood that the 2008 presidential election will as well.

If indeed the country makes it past the 2008 election itself without the Court needing to decide a *Bush v. Gore* issue, then presumably it will be a different group of nine that will be the first to apply that case as precedent. We can expect the next President to replace Justice Stevens (who would be 92 in 2012), and perhaps Justice Ginsburg as well (who, as the next oldest, would be 79).<sup>135</sup> Although neither replacement necessarily would move Justice Kennedy from his metaphorically center seat, especially if a Democrat wins the White House in 2008, it is possible that a Republican winner in 2008 would make appointments that could cause the center of the Court to shift rightward still, perhaps to Chief Justice Roberts himself.

## 2. Long-term Prognosis for Another *Bush v. Gore* Claim Before the Supreme Court

One cannot know when a direct lower court conflict will develop over the application of *Bush v. Gore* as an Equal Protection precedent. When considering whether to grant certiorari, the Court distinguishes "true" from "false" conflicts, as many petitions allege the existence of a conflict in lower court holdings when, in reality, there is only "tension" in the language of lower court opinions (what lawyers term "dicta").<sup>136</sup> A true lower court

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<sup>133</sup> The literature on the Hays-Tilden election of 1876 is vast, especially after *Bush v. Gore*, when comparisons were inevitable. Chief Justice Rehnquist himself wrote a book on the subject: WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004). See also CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 (1988); ROY MORRIS, JR., FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876 (2003).

<sup>134</sup> See, e.g., Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937 (2005). See also Ian Urbina, *As Vote Nears, Parties Prepare for Legal Fights*, N.Y. TIMES, Nov. 4, 2006, at A1.

<sup>135</sup> The birth dates of the Justices are on the U.S. Supreme Court's website: <http://www.supremecourtus.gov/about/biographiescurrent.pdf>. Cf. Hal Boedeker, *PBS Courts Viewers With Justice: A Documentary Examines and Celebrates the High Court and its Towering Legal Minds*, ORLANDO SENTINEL, Jan. 31, 2007, at E9 (both Justices Stevens and Ginsburg in generally good health and desirous to stay on).

<sup>136</sup> See also STERN ET AL., *supra* note 121, at 225; Thomas J. Long, *Deciding Whether Conflicts with Supreme Court Precedent Warrant Certiorari*, 59 N.Y.U. L. REV



conflict exists when, based on lower court precedent, it is clear that different federal courts of appeals or state supreme courts would give opposite answers to the same federal question presented in a case involving identical facts. In other words, if the exact same case were in a different jurisdiction, the highest court beneath the U.S. Supreme Court with the authority to decide the case would undoubtedly reach the opposite result than the court from which the petition for certiorari arrives. Of course, the Supreme Court is sometimes willing to grant certiorari in the absence of a true lower court conflict, but the odds are against it, and one can surmise the Court would be looking for a true conflict before wading back into the territory of *Bush v. Gore*.<sup>137</sup>

Given the myriad of conceptually different fact patterns that might present claims based on *Bush v. Gore*, as we saw from the four categories identified above as well as multitudinous permutations within each distinct category, it is unlikely that a true lower court conflict exists just because some decisions sustain *Bush v. Gore*-based claims while others do not. For example, suppose that the First Circuit rules meritorious a claim arising from local variation in the verification of provisional ballots because of insufficiently specific statewide standards (the strongest fact pattern in our first category above), while the Second Circuit rejects a claim involving excessively long lines at some precincts because of misallocation of voting machines by county officials (by no means the strongest fact pattern within the third category above). Although these results go in different directions, there is no true conflict between them.

Here's how the apparent conflict could disappear. The First Circuit might also reject the claim in the long lines case, while the Second Circuit might also sustain the claim in the provisional ballot case. This is true even if the Second Circuit's opinion in the long lines case contains dicta that is generally dismissive of claims based on *Bush v. Gore*, saying that the court cannot imagine circumstances beyond the facts of *Bush v. Gore* itself where such a

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1104 (1984). See generally Arthur Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247 (1998).

<sup>137</sup> Recently, there has been much discussion of the fact that the number of petitions for certiorari that are worthy of a grant by historical standards ("certworthy" in local parlance) is especially low, and that the Court therefore has had to relax its standards in order to keep its docket of argued cases at the same level. Linda Greenhouse, *As to the Direction of the Roberts Court: The Jury is Still Out*, N.Y. TIMES, Mar. 7, 2007, at A15; Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court*, N.Y. TIMES, Dec. 7, 2006, at A1. If this phenomenon continues, it is conceivable that the Court would feel compelled to take a case presenting an important *Bush v. Gore* claim even if a "true conflict" did not exist on the precise question. Even so, a reluctance to consider such a *Bush v. Gore* claim might cause the Court to apply its old "true conflict" standard to this petition, even as it relaxed its standard for petitions presenting other kinds of issues.

claim would prevail. Until that court has before it the kind of provisional ballot case where the First Circuit ruled in favor of the claim, one cannot know for sure that the Second Circuit would reject it as well. The Second Circuit might pull back on its dicta once it received briefing and argument on the merits of the distinctively powerful claim in the provisional ballot context. Conversely, even if the First Circuit's opinion in the provisional ballot case sweeps broadly, suggesting that the court would sustain Equal Protection claims "whenever there are unjustified local inequalities in voting administration," one cannot be sure that the First Circuit would grant relief in the long lines situation. That court, too, might pull back on its dicta, observing that while long lines are an impediment to voting, they do not involve an outright rejection of a ballot, whereas both *Bush v. Gore* and the provisional voting case do, and the Equal Protection principle of those cases should be understood as limited to that context rather than extending to the long lines situation.

Thus, until either the First Circuit actually confronts a long-lines case of its own, or the Second Circuit faces its own provisional ballot case, the occasion for a true lower conflict has not yet arisen. Yet given the relative infrequency of disputed elections—compare the ubiquity of criminal prosecutions that could generate a true conflict over a *Miranda*-related question<sup>138</sup>—it easily could take decades for a true conflict to emerge over the application of *Bush v. Gore*. Moreover, if the Court would prefer for the true conflict to widen (or percolate) among lower courts, rather than resolving it as soon as just two courts reach opposite results on necessarily equivalent facts, it could be another few decades before the Court decides it is ready to tackle the issue.

To be sure, circumstances might arise that would cause the Court to address the merits of a *Bush v. Gore*-based claim before a true conflict developed. Another disputed presidential election, like Florida's in 2000, could freakishly happen much sooner than it is reasonable to expect. And perhaps the Supreme Court would feel obligated to resolve an Equal Protection claim based on *Bush v. Gore* that arose in the context of a disputed Senate or gubernatorial race, although the Court might feel that other institutions could handle the particular dispute—the Senate in the case of one of its own seats, and the applicable state legislature in the case of a gubernatorial election.<sup>139</sup> Therefore, in the absence of a lower court conflict

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<sup>138</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>139</sup> Cf. *Roudebush v. Hartke*, 405 U.S. 15 (1972). In this case, the Court held that the Senate's constitutional authority to judge the qualifications of its own members did not necessarily preclude a state court recount procedure. *Id.* at 25. But the Court in no way suggested that it would supervise, or even let a lower federal court supervise, the recounting of ballots in a Senate election. *Id.* at 20.

over the Equal Protection question presented by the particular disputed election, the Court might decide to let the other institution determine which candidate won the contested race.

Instead, the Supreme Court would be more likely to intervene in the absence of a true conflict if it perceived that the lower court decision improperly prevented a state from making a constitutionally permissible policy choice with respect to the structure of its voting process. For example, if the Eleventh Circuit in *Wexler v. Anderson* had invoked *Bush v. Gore* to prevent Florida from employing touchscreen machines unless equipped with a paper trail, which would have been the opposite of the Eleventh Circuit's actual decision in the case, the Supreme Court more likely would have granted certiorari right away, despite the absence of any true conflict on the issue. The reason is that this hypothetical result in *Wexler* would have invalidated a policy choice made by the state's legislature, and the Court feels obligated not to let federal constitutional law block a state legislature's policy judgment on the basis of a lower court decision alone.<sup>140</sup>

Not all categories of *Bush v. Gore* claims involve challenges to state policy choices. Claims based on insufficiently specific standards (category one) or mistaken understanding of state law (category two), even if sustained by a lower court, would not prevent a state legislature from making the policy choices it wishes. Where local officials simply misread state law, a lower court remedy for that inequality obviously would not intervene with any policy choice made by the state legislature. In the case of insufficiently specified standards, the state legislature could achieve its desired policy by adopting more precise rules. Of course, if a lower court demanded more precise results in a situation where they were not feasible, that would be another matter, which might provoke immediate Supreme Court review. Likewise, were a federal circuit to approve the kind of injunction sought in *League of Women Voters v. Blackwell*—which essentially asks the federal judiciary to take over supervisory control of a state's entire voting administration system<sup>141</sup>—the Supreme Court would be more inclined to

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<sup>140</sup> See, e.g., STERN ET AL., *supra* note 121, at 247. See also Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 289 (2004).

<sup>141</sup> Amended Complaint, *supra* note 37, at 58–60. In addition to itemizing eight different areas of voting administration for which they want the federal court to order the promulgation of specific uniform rules (including registration, voting machine procurement and allocation, poll worker recruitment and training, and absentee and provisional voting), the plaintiffs also ask the federal court to order the Secretary of State to set up an administrative mechanism to detect and correct deficiencies that occur in the operation of the electoral process. Finally, as a catch-all, the complaint asks for a federal court injunction that requires the Secretary of State “[t]o ensure that each county within Ohio conducts efficient, just and fair . . . elections.” *Id.* at 60.

intervene immediately, to prevent what on the merits might be an unwarranted intrusion into a state's administrative prerogatives.

Nonetheless, it would be wrong to assume that the Supreme Court will grant certiorari in the first case that comes to it where a lower court has sustained an Equal Protection claim based on its view of *Bush v. Gore* as a precedent. Even if the Justices themselves might be inclined to think that the lower court had engaged in an unwarranted extension of *Bush v. Gore*—say, for example, the Justices think that the precedent has no applicability to local variation caused by mistakes rather than insufficiently specified standards in the narrow circumstances of a court-ordered recount—the Justices still might let the decision stand and wait for a true conflict to develop on the specific issue. In this circumstance, there would be no harm to state sovereignty in leaving the perhaps overly generous lower court decision in place. If nothing else, the Justices might want to see how often cases arise in which inequalities in voting opportunities result from local mistakes, as that piece of data might eventually be a factor in its view of the merits of extending *Bush v. Gore* to this category of mistake-based claims. Consequently, waiting for a conflict to develop on this issue—and indeed letting this conflict percolate for a while—might be beneficial to the Court's ultimate resolution of the issue.

This analysis suggests, however, that a certain asymmetry might develop in the Court's consideration of cases involving claims based on *Bush v. Gore*. The first one that the Court will consider is most likely to be one in which the lower court uses *Bush v. Gore* to invalidate a state legislature's policy choice or, perhaps, the policy choice of the state's chief elections officer (usually Secretary of State) under a delegation of authority granted by the state's legislature. Moreover, a case of this kind is one further removed from the facts of *Bush v. Gore* itself, in either the third or fourth category above (depending on the nature of the state legislature's policy choice). Thus, it is a case in which a majority of the Court is more likely to reject the merits of the claim, thereby reversing the lower court's contrary decision. If so, then the first Supreme Court case involving the application of *Bush v. Gore* as an Equal Protection precedent will be to demarcate a limit on the scope of that precedent.

Furthermore, this asymmetrical pattern might persist over time. While the Court follows its general posture of waiting for true conflicts to percolate in situations where state policy choices are not at stake, it immediately grants review—and then reverses—in any case involving the invocation of *Bush v. Gore* to invalidate a state policy choice. If this scenario develops in this way, all *Bush v. Gore* claims in the third and fourth categories would be foreclosed before the Court ever felt the need to resolve a true lower court claim over a distinctive Equal Protection claim falling within either the first or second categories: insufficiently specific standards or local misunderstandings of a

state rule. The question then would be whether this path-dependent development would cause the Court, when it eventually got around to resolving a conflict over a claim in the first or second category, to reject that claim based on the intervening negative precedent.

This path-dependent outcome is certainly possible for the reasons we have discussed above: a category-two claim involving a local mistake ends up getting to the Court in a much weaker posture, because the Court has already foreclosed all category-three claims. But perhaps a true conflict will develop over a category-one claim before it does over a category-two claim, and the category-one claim will turn out to be strong enough to withstand the negative pressure from the foreclosure of all category-three claims. Maybe, then, by the time the category-two claim gets to the Court, there will be enough positive counter-pressure from the vindication of the category-one claim to cause it to prevail, even though it would have been rejected if they had been decided in the opposite order.<sup>142</sup>

### 3. *Reputational Concerns as a Review-Accelerating Factor?*

Because *Bush v. Gore* itself was an extraordinary case, there may be other extraordinary factors that could affect the Court's decision on whether to grant certiorari in cases applying that precedent. We have already identified a natural reluctance to open old wounds. But there is the potential of a countervailing dynamic that deserves consideration.

Suppose a lower court rejects the merits of an especially strong category-one Equal Protection claim, like the one involving variations in the verification of provisional ballots. Suppose, further, that the lower court does so in a way that disparages the Equal Protection holding of *Bush v. Gore* itself, suggesting that it was unprincipled, applicable solely to its only chad-based facts, and never to be relied upon to sustain the merits of any other Equal Protection case. Judge Gilman essentially took that position in his dissent in *Stewart v. Blackwell*, and that position might have become the majority view in the Sixth Circuit after rehearing en banc, had the case not

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<sup>142</sup> In his own contribution to this symposium, Michael Solimine considers the effect that the Court's discretionary control over its certiorari docket has with respect to election law cases as a distinct category. See Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767 (2007). Solimine observes that the procedures that cause an election case to be heard on the merits by the Court can affect the determination of the merits itself. Consequently, these procedures warrant further study in their own right, a process that Solimine has usefully begun. Because of the risk of strategic considerations affecting the grant or denial of certiorari in voting administration cases, however, it may be that the Court should have less, not more, discretionary control over its own docket in these cases.

disappeared on mootness grounds.<sup>143</sup> If a federal court of appeals were to take this position in a strong category-one case, involving insufficiently specific statewide standards, there might be a temptation on the part of some Justices to take the case just to disprove the lower court's accusation that *Bush v. Gore* was inherently unprincipled.

There is no doubt that the Justices consider the merits of the case when they decide whether or not to grant certiorari, even though formally the disposition of a certiorari petition is not a ruling on the merits, and even if factors other than the merits of the case—like the presence or absence of a true lower court conflict—heavily influence most decisions at the certiorari stage.<sup>144</sup> Simply put, the Justices grant certiorari more often to reverse than to affirm, as annual statistics routinely confirm.<sup>145</sup> Moreover, the Justices always have in mind the possibility of a summary reversal: a merits ruling at the certiorari stage, without benefit of further briefing and oral argument, when a lower court decision is unquestionably wrong and deserving of rectification, although not worthy of further deliberation by the Court.<sup>146</sup> A lower court decision that disparaged *Bush v. Gore* itself, refusing to apply it to facts where its precedent was most forceful (like the provisional ballot case), might not warrant a summary reversal in the eyes of the Justices, but it might be reason enough to grant certiorari in the case, to set the record straight that *Bush v. Gore* has some scope beyond solely its own facts. If discussion of this disparaging lower court opinion at the Court's conference on the petition for certiorari indicated quickly that there was widespread

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<sup>143</sup> Judge Gilman relied extensively on Richard L. Hasen's 2001 article, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377 (2001), which argued that it is difficult to take the case seriously as an Equal Protection precedent. Discussing Hasen's article for several pages, *see* *Stewart v. Blackwell*, 444 F.3d 843, 886–89 (6th Cir. 2006) (Gilman, J., dissenting), and characterizing its analysis as “reasons ably articulated by a leading election-law expert,” Judge Gilman concluded that the Sixth Circuit “should heed the Supreme Court's own warning and limit the reach of *Bush v. Gore* to the peculiar and extraordinary facts of that case.” *Id.* at 886. When in response the majority opinion accused Judge Gilman of allowing a law review article to overrule a Supreme Court precedent, Judge Gilman replied: “I am not . . . making [that] . . . nonsensical claim . . . [but] instead faithfully following the Supreme Court's explicit admonition . . . .” *Id.* at 889.

<sup>144</sup> STERN ET AL., *supra* note 121, at 256; Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727 (2001).

<sup>145</sup> *See* STERN ET AL., *supra* note 121, at 257; LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* 712–14 (4th ed. 2007). *See also* Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 4 (1989); Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principle-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 826 (2003).

<sup>146</sup> STERN ET AL., *supra* note 121, at 315–16. *See also* Marcia Coyle, ‘Hamdan’ and the Rest, NAT'L L.J., Aug. 2, 2006, at 1 (noting an increase in summary reversals).

sentiment among the Justices that this case was an easy one—the principle of *Bush v. Gore* readily applies, for example, to local variations in the rejection of provisional ballots caused by an insufficiently specific state law that easily could have been clearer—then the Justices would know that granting the petition, far from opening old wounds, would actually help bury any lingering ill feelings over *Bush v. Gore* itself. An easy ruling extending *Bush v. Gore* to a new set of facts, in addition to showing this lower court that it was wrong to disparage that Equal Protection precedent, would have the added benefit of showing academics and all the other commentators that castigated *Bush v. Gore* that its Equal Protection holding was indeed principled.

An important new book on judicial behavior, by Ohio State political scientist Larry Baum, posits that judges are concerned about their reputations among audiences whom they care about.<sup>147</sup> Supreme Court Justices, in particular, are concerned about their reputation among other intellectual elites in society, including leading academics and journalists. One can surmise that several Justices are concerned with reputational damage caused to the Court among intellectual elites by *Bush v. Gore* and would be pleased to find a vehicle for rehabilitating that reputation.

Justice Kennedy, in particular, would appear to have the most direct incentive of this kind. Assuming he indeed is the author of the majority opinion in *Bush v. Gore*, he might welcome an easy opportunity to put that precedent on a firmer footing. Some Court observers have suggested that he is particularly concerned about his reputation among intellectual elites.<sup>148</sup> If so, he would be especially troubled by a lower court opinion that essentially thumbed its nose at *Bush v. Gore*, echoing academic and media commentary that mocked its Equal Protection ruling as openly unprincipled.

Although Justices Scalia and Thomas joined the majority opinion in *Bush v. Gore*, their general jurisprudence would give them little reason to reach out for a case that would bolster the Equal Protection principle of *Bush v. Gore*. Although they might not argue vociferously against a grant of certiorari in a case like this, it is doubtful that they would take the lead in bringing it to the Court. Justices Breyer and Souter, on the other hand, expressed sympathy with the Equal Protection holding of *Bush v. Gore*, although not its remedy, and they are Justices who appear especially concerned about the Court's institutional reputation among intellectual elites.<sup>149</sup> Thus, they might well be inclined to join Justice Kennedy in

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<sup>147</sup> BAUM, *supra* note 122.

<sup>148</sup> *Id.* at 143.

<sup>149</sup> Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After Bush v. Gore: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL'Y REV. 101, 106 (2002) ("Of all of the dissenters in *Bush v. Gore*, Justice

granting certiorari to reverse a lower court opinion that they perceive as challenging the Court's institutional integrity if left unreviewed.

For similar reasons, Chief Justice Roberts might go along with a grant in an easy case for extending *Bush v. Gore*, where the lower court opinion showed disrespect for the Supreme Court's Equal Protection ruling there. In his confirmation hearings, he seemed eager, or at least willing, to acknowledge that the precedent of *Bush v. Gore* could be applied in a principled way. Moreover, as Chief Justice, he has special concern for the overall reputation of the federal judiciary, and a lower court opinion disrespectful of *Bush v. Gore*, even if rendering a correct resolution of the Equal Protection claim on its particular facts, would be worthy of a rebuke from the High Court. Especially if Justices Stevens and Ginsburg (or their replacements down the road) seem willing to go along with an emerging consensus at the Court's conference that this petition should be granted to show that the Equal Protection principle of *Bush v. Gore* extends beyond its own unique facts, then one can imagine how certiorari might be granted in this kind of situation even without the existence of a lower court conflict.

But even if the Justices would still wait for a lower court conflict to develop, this reputational concern might cause them to grant certiorari in a case as soon as the conflict arose among two lower courts, rather than waiting for it to widen or percolate (as they otherwise might be inclined to do). Suppose that one lower court says that *Bush v. Gore* is essentially meaningless as a precedent, even in a category-one case presenting especially compelling facts for extending it slightly, whereas another lower court says just the opposite on equivalent facts. That two-court true conflict, with one side taunting the Court, might provoke an immediate grant.

Even if no lower court adopts a position as provocatively dismissive as Judge Gilman's dissent in *Stewart v. Blackwell*, the Justices' concern for the Court's reputation among intellectual elites still might accelerate their granting review in a *Bush v. Gore*-based case. The reason is that there is a certain irony about the nature of the Equal Protection principle in *Bush v. Gore*, especially if it is best understood as focused on circumstances involving insufficiently specific standards. *Bush v. Gore* is itself insufficiently specific in the Equal Protection standard it adopts, and any conflict among lower courts concerning the implementation of the Equal Protection principle in *Bush v. Gore* could be seen as contrary to the

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Breyer seemed most concerned with the impact of the case on the Court's legitimacy and efficacy."'). See also *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (discussing Court's reputation as a factor in *stare decisis*; Justice Souter commonly recognized as author of *stare decisis* portion of *Casey*).



principle itself.<sup>150</sup> Divergence among lower courts interpreting *Bush v. Gore* would be a species of local variation in the interpretation of a vague, general standard concerning the counting of ballots, and commentators could poke fun at the doctrine of *Bush v. Gore* as being in violation of itself. (*Bush v. Gore* ruled unconstitutional the “unequal evaluation of ballots” for “want of” “specific rules designed to assure uniform treatment,” yet when provisional ballots get counted in one federal circuit, whereas they do not in another federal circuit, because of a circuit split over *Bush v. Gore* itself, this circuit split presents its own *Bush v. Gore* problem.) While this irony is “inside baseball,” to which the general public would remain oblivious, it would be a source of ongoing embarrassment within the elite Court-watching circles (academics and journalists) whose opinions the Justices care about. Consequently, at least four Justices might wish to grant certiorari sooner rather than later, to clear up lower court confusion about the proper scope of the Equal Protection principle in *Bush v. Gore*.

For this reason, again, these Justices might jump at the chance to resolve the first true conflict arising over the application of *Bush v. Gore*. Moreover, they might not even wait for a true conflict to develop if they see sufficient confusion among lower court opinions on the proper understanding of that precedent. Considerable disagreement among lower court judges concerning *Bush v. Gore* suggests unpredictability, even lawlessness, in an area of law (voting administration) that the Court—indeed, *Bush v. Gore* specifically—says requires predictability and evenhanded clarity. A desire that intellectual elites come to view the doctrine of *Bush v. Gore* as consistent with the values underlying *Bush v. Gore* might motivate the Justices to grant review of a new *Bush v. Gore* case sooner than they otherwise would be inclined to do so.

One should not, however, make too much of this reputational concern. It is only one factor among many likely to influence the views of each Justice as they decide whether or not to grant certiorari in a particular case. Moreover, the strength of this reputational concern is dependent upon the particular details of the case in which the petition is filed (did the lower court thumb its nose at the Court?), as well as the circumstances regarding the overall lower-court landscape in *Bush v. Gore* territory. As long as most lower-court decisions applying *Bush v. Gore* appear to the Justices as reasonable (even if not necessarily correct) efforts to make sense of that precedent, and if apparent divergences among those lower court decisions are best explained by the different particular facts of each case (such that true conflicts, if any, are few and not widespread), then the Justices quite likely would just as soon stay away from these cases. If this scenario is the one that

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<sup>150</sup> Cf. Mary A. Case, *Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of Bush v. Gore as a Chapter in The History of Ideas About Law*, 70 U. CHI. L. REV. 55 (2003).

unfolds, as is probably the best bet, then indeed it could be decades before the Court is ready to revisit that precedent.

In other words, the future of *Bush v. Gore* as an Equal Protection precedent could be somewhat analogous to the status of *Bakke*<sup>151</sup> during the two-and-a-half decades before *Grutter*<sup>152</sup> and *Gratz*.<sup>153</sup> In each situation, the rather inscrutable pronouncement from on high takes on a life of its own in the lower court and in the community regulated by the precedent. UC Davis Medical School may have lost, but higher education administrators were able to work with Justice Powell's opinion in *Bakke* to fashion an affirmative action regime suitable to their purposes, with limited interference from lower courts. Once the issue had matured enough to require the Supreme Court to intervene in the area again, the accumulated history of relevant events on the ground were critical in shaping Justice O'Connor's consideration of the new cases.

Something similar could occur in the world of voting administration concerning the Equal Protection principle in *Bush v. Gore*. Voting rights activists and election officials could build up their own operational expectations of what Equal Protection requires regarding the casting and counting of ballots. These expectations, left relatively undisturbed or even largely validated by lower courts that intermittently confront deviations from prevailing practices, could accumulate into a body of wisdom about what *Bush v. Gore* stands for, in much the same way that there had developed a "settled understanding" of *Bakke* despite its having been the pronouncement of a single Justice. At whatever point a situation arises that requires the Court to revisit *Bush v. Gore*, that accumulated understanding of the case among election practitioners might end up being as significant, or even more so, than any "original understanding" of the precedent that the Justices might have had.

Thus, the future of *Bush v. Gore* as an Equal Protection precedent is extraordinarily unpredictable. It depends on what particular fact patterns arrive at the Court and when they do so, including in what order. It depends on what the lower courts have done with those fact patterns and who sits on the Court when they arrive there. And it depends on the psychological disposition of the Justices to either stay away from a sore subject or return to it in an effort to set matters straight. Yet the psychological disposition of the Justices themselves in this regard is likely to be affected by all these other unpredictable factors.

Law in general may lack certainty, but the law of *Bush v. Gore* seems especially open to alternative pathways.

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<sup>151</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>152</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>153</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

III. THE PROCEDURAL PRECEDENT OF *BUSH V. GORE*

It is sometimes suggested that the significance of *Bush v. Gore* lies less in its doctrinal Equal Protection holding, whatever that may be, and more in its signal that the federal judiciary stands ready to remedy irregularities that occur in the administration of state voting procedures. As Samuel Issacharoff has succinctly put it, the message of *Bush v. Gore* is that the courts are “open for business” in these sorts of cases.<sup>154</sup> Moreover, the election law community has certainly received this message: as Richard Hasen has documented, the number of lawsuits over voting procedures has risen sharply since *Bush v. Gore*.<sup>155</sup>

In addition, some of these lawsuits have been successful in shaping the legal terrain on which electoral battles between candidates are fought. Most noticeably, litigation in 2004 prevented the Republican Party in Ohio from challenging the eligibility of 35,000 new voters in pre-election administrative proceedings.<sup>156</sup> Similarly, litigation in 2006 prevented newly enacted voter identification laws from taking effect, at least in part, in Ohio as well as other states (Georgia and Missouri).<sup>157</sup>

But the record of litigation since *Bush v. Gore* over voting administration procedures is decidedly mixed. More lawsuits appear to have been futile rather than successful, especially when considering the number of district court injunctions vacated on appeal. Indeed, the only opinion of the Supreme Court in a voting administration case since *Bush v. Gore* sends a strong signal *against* federal court intervention. Furthermore, upon reflection, *Bush v. Gore* is a case more about shutting courthouse doors than opening them:

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<sup>154</sup> He made this point during the presentation of an earlier draft of this paper at this Symposium. Samuel Issacharoff, Remarks at the Election Law and the Roberts Court Symposium at The Ohio State University Moritz College of Law (Sept. 29, 2006) available at <http://moritzlaw.osu.edu/lawjournal/symposium/2006-07/index.php> (follow the “Friday Afternoon” hyperlink, remarks start at 19:40).

<sup>155</sup> Hasen, *Beyond the Margin of Litigation*, *supra* note 134, at 958.

<sup>156</sup> *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004) (granting TRO), *stay denied*, 388 F.3d 546 (6th Cir. 2004).

<sup>157</sup> In the Ohio ID case in 2006, although the Sixth Circuit vacated the district court’s TRO, a subsequent consent decree blocking any enforcement of the ID rules with respect to absentee ballots gave the plaintiffs the same relief they had specifically sought in the TRO. Consent Order, *NEOCH v. Blackwell*, No. C2-06-896 (S.D. Ohio Nov. 1, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCHConsentOrd.pdf>. In Georgia, a state trial court permanently enjoined enforcement of that state’s new ID law, preventing it from having effect before the 2006 general election. See *supra* note 129. In Missouri, that state’s supreme court invalidated the ID law there as contrary to the state’s constitution. *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Opinion.pdf>.

the Court there, after all, precluded any further recount proceedings that the Florida Supreme Court might have wished to have ordered.

Thus, the ultimate procedural legacy of *Bush v. Gore*, far from expanding judicial supervision over state administrative procedures for the casting and counting of ballots, may narrowly circumscribe judicial involvement in these matters, limiting the availability of judicial relief to only especially egregious situations.

#### *A. Litigation over Voting Administration Procedures since Bush v. Gore*

Apart from the successes already mentioned, it is important to identify those situations since *Bush v. Gore* where litigation over procedures for casting and counting ballots failed to change either the outcome of the election or the rules according to which the electoral battle was fought.

First, and foremost, in the contested 2004 gubernatorial election in Washington, where the final certification showed the Democratic candidate with only 129 more votes than her Republican opponent, the court refused a remedy despite accepting the fact that this certified result included 1678 unlawful votes.<sup>158</sup> This situation is arguably the one since 2000 most like the contested presidential election in Florida: it involved a ballot-by-ballot brawl over which candidate won an important statewide race. It was also a situation where there was good reason to think that the wrong candidate had been certified the winner: although no one would ever know for sure for which candidate those 1678 unlawful votes had been cast, they disproportionately came from precincts that favored the Democratic candidate—and by margins great enough to indicate that the outcome would have been the opposite if these unlawful votes had been properly excluded.

Moreover, if there was to be any remedy for this apparently erroneous outcome, it would have to come from the courts, as the state's legislature was politically predisposed to favor the Democratic candidate. But no such remedy was forthcoming. Instead, the trial judge slammed shut the courthouse door, because it was impossible to prove for whom the unlawful votes had been cast. The Republican candidate decided not to appeal, in part because precedent from the state supreme court supported the trial court's ruling. Nor did the Republican candidate attempt to have the federal judiciary prevent or undo the certification of the election because, although the certification was undeniably flawed, the federal courts would not have perceived themselves empowered to declare a different winner or order a new election.

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<sup>158</sup> *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. June 6, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/oraldecision.pdf>.

This outcome in Washington, then, shows that, after *Bush v. Gore*, judicial relief remains unavailable even where it is arguably most needed to rectify administrative irregularities regarding the counting of ballots in important statewide elections.<sup>159</sup>

Second, also in 2004, although in Ohio there was the litigation that prevented pre-election challenges of voter eligibility, other litigation in that state was much less successful. A state court suit to add to the voter registration rolls over 10,000 names that allegedly had been improperly omitted was rejected on the ground that these individuals could cast provisional ballots and the validity of their omission from the rolls could be resolved during the process of verifying their provisional ballots.<sup>160</sup> (A similar suit in Florida in 2004 was also rejected on similar grounds.<sup>161</sup>) A federal court suit to overturn Ohio's rule that provisional ballots must be cast in the proper precinct to be counted, although successful in the district court, was largely overturned in the Sixth Circuit.<sup>162</sup> Likewise, after the victory over pre-election challenges, another suit to block challenges to voter eligibility at polling places on Election Day, although also successful in the district court, was overturned by the Sixth Circuit,<sup>163</sup> and on Election Day itself Justice Stevens issued a pre-dawn opinion as Circuit Justice refusing to intervene.<sup>164</sup>

Third, turning to 2006, again in Ohio, although one suit attacking a patently unconstitutional aspect of the state's new voter identification law (which required naturalized citizens, but not native-born citizens, to provide documentation of their citizenship) resulted in an injunction that was not appealed by the state,<sup>165</sup> and although another suit seeking to block enforcement of the voter ID law altogether ended in a consent decree that

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<sup>159</sup> For further discussion of whether judicial relief should be available in circumstances like the 2004 Washington gubernatorial election, see Huefner, *supra* note 83.

<sup>160</sup> *Citizens Alliance for Secure Elections v. Vu*, No. 1:04cv2147 (N.D. Ohio Oct. 27, 2004) (order denying temporary restraining order), available at <http://moritzlaw.osu.edu/electionlaw/docs/ohio/citizens/order.pdf>. See also *Lucas County Democratic Party v. Blackwell*, 341 F. Supp. 2d 861, 864 (N.D. Ohio 2004) (denying similar order).

<sup>161</sup> *Diaz v. Hood*, 342 F. Supp. 2d 1111, 1113 (S.D. Fla. 2004).

<sup>162</sup> *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004).

<sup>163</sup> *Summit County Democratic Central and Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).

<sup>164</sup> *Spencer v. Pugh*, 543 U.S. 1301, 1303 (2004) (Stevens, Circuit Justice).

<sup>165</sup> *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 823 (N.D. Ohio 2006) (order granting permanent injunction), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/OpinionandOrder.pdf>. (My Moritz colleague Dan Tokaji served as counsel for the plaintiffs in this case.)

prohibited its applicability to absentee ballots,<sup>166</sup> a district court decision that would have served as a predicate for enjoining its enforcement entirely was vacated by the Sixth Circuit.<sup>167</sup> Similarly, on Election Day in Ohio, another federal district judge ordered polling places in Cleveland to stay open until 9:00 P.M., because there had been delays in their opening in the morning, but later that day the Sixth Circuit modified that decision—as required by the Help America Vote Act—by ordering that any ballots cast during those extended hours be provisional ballots.<sup>168</sup> In Texas, a federal district judge enjoined enforcement of a state law that prohibited third parties from handling absentee ballots without disclosure, and the Fifth Circuit quickly vacated that decision.<sup>169</sup>

The pattern of these cases suggests an excessive exuberance on the part of some federal judges to intervene in the administration of a state's voting procedures. Perhaps that exuberance is motivated in part by a feeling that the spirit of *Bush v. Gore* authorizes such intervention. But in each of these cases, the appellate courts consider the interference unjustified, with the

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<sup>166</sup> See *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004).

<sup>167</sup> *NEOCH v. Blackwell*, 467 F.3d 999, 1002 (6th Cir. 2006). This Sixth Circuit ruling was particularly damaging to the plaintiffs in the case because it took a restrictive view both on standing and on the balancing of the equities relevant for the issuance of any preliminary injunction. *Id.* at 1010–12. The appellate court saw little harm to plaintiffs from requiring voters to present ID, since the only consequence was having to cast a provisional ballot (which could be counted without regard to lack of ID if, after Election Day, the state's ID law were ruled invalid on federal grounds). *Id.* at 1011–12. By contrast, the appellate court saw great harm to the state from a preliminary injunction that prevented election officials from requiring voters to present ID, since if after Election Day the state's ID law were ruled valid on federal grounds, there would be no way to undo the consequences of ballots having been cast without an ID requirement in effect. *Id.* at 1011.

<sup>168</sup> *Ohio Democratic Party v. Cuyahoga County Bd. of Elections*, No. 06-4452 (6th Cir. Nov. 7, 2006) (order modifying district court order), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/6thcircuitdecision.pdf>. Although the Sixth Circuit observed that it had no time to pass judgment on the merits of the extension itself, the only justification that the district court gave for its intervention was a single-sentence assertion that the delayed opening of the polls, resulting in “wait times in excess of one hour,” was arguably a violation of the First and Fourteenth Amendments. *Ohio Democratic Party v. Cuyahoga County Bd. Of Elections*, No. 1:06CV2692 (N.D. Ohio Nov. 7, 2006) (order granting preliminary injunctions in part at 1), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ccorder.pdf>. After *Purcell v. Gonzalez*, see *infra* Part III.B, it seems highly unlikely that this meager assertion provides a sufficient factual basis or reasoned explanation for federal court interference in the voting process.

<sup>169</sup> *Ray v. Abbot*, No. 06-41573, 1 (5th Cir. Nov. 3, 2006) (order granting motion to stay) (per curiam), *application to vacate denied*, 127 S. Ct. 551 (2006) (mem.), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/USCAJUDGMENT.pdf>.

upshot being more and more law defining when federal courts should keep their hands off the workings of a state's voting process.

### B. *The Importance of Purcell v. Gonzalez*

The excessive exuberance of one federal court in 2006 ended up in a unanimous Supreme Court opinion rebuking that court.<sup>170</sup> In this case, the court was the Ninth Circuit rather than a district court, but the Supreme Court played the role of an appellate court vacating an injunction that the Ninth Circuit had issued. The case involved another new voter ID law, this one from Arizona. The plaintiffs had challenged it as an unconstitutional poll tax in the same way that other new ID laws had been challenged elsewhere. The district court refused to grant a preliminary injunction to block enforcement of the law in the November election, but a two-judge panel of the Ninth Circuit agreed to do so. The unanimous Supreme Court opinion vacating that injunction has been widely viewed as a signal to all federal courts to proceed very cautiously before interfering with the operation of a state's voting procedures during the last few weeks immediately preceding Election Day.<sup>171</sup>

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<sup>170</sup> *Purcell v. Gonzalez*, 127 S. Ct. 5, 6–8 (2006) (per curiam). Justice Stevens wrote a brief concurrence with a softer tone, but he joined the per curiam opinion as well. *Purcell*, 127 S. Ct. at 8 (Stevens, J., concurring).

<sup>171</sup> Rick Hasen and Dan Tokaji fear that lower federal courts will indeed view *Purcell* this way. See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 101 (2007); Tokaji, *supra* note 130, at 1088–90. I am less troubled by *Purcell* than they are. For reasons that Professor Tokaji identifies in his immensely valuable contribution to this Symposium, the unanimous opinion in *Purcell* is not a ruling on the merits of Arizona's voter identification requirement—and its brief discussion of the issue merely provides background for the opinion's purely procedural ruling. *Id.* More importantly, regarding that procedural ruling, I consider it more appropriate than Hasen or Tokaji do for the Supreme Court to send a cautionary signal about the potentially disruptive effects of judicial intervention shortly before the polls open for voting. Professor Hasen reads *Purcell* too broadly when he suggests that it prevents lower courts from issuing pre-election orders to protect voters from disenfranchisement. See Hasen, *supra*, at 134. On the contrary, the availability of provisional ballots guarantees that no voter need be disenfranchised by a voter identification requirement that a federal court after Election Day rules unconstitutional. (At the time of its post-election ruling, the federal court can order the provisional ballots to be counted if the state's reason for not counting them is the unconstitutional voter ID law.) While I agree with both Hasen and Tokaji that pre-election litigation is generally preferable to post-election disputes over provisional ballots, that general preference must be weighed against the destabilizing nature of last-minute lawsuits before voting begins. All *Purcell* holds is that, in the particular posture of the case before it, the balance of equities favors lifting the Ninth Circuit's belated order (in part because of the availability of provisional voting, as the Court itself expressly observes). Additionally, I think Professor Tokaji is uncharitable in

In fact, the Supreme Court opinion is explicit and emphatic on this point. The opinion begins a key paragraph with the observation that, because the case arrived at the Ninth Circuit “just weeks before an election,” that court “was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases . . . .”<sup>172</sup> Then, in a crucial sentence, the opinion states, “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”<sup>173</sup> The clear implication is that courts must not issue such orders when the risk of these disruptive effects outweighs whatever other net benefits judicial intervention would provide. And to make this point even clearer, the Court adds, “As an election draws closer, that risk will increase.”<sup>174</sup>

To be sure, the Supreme Court’s opinion in *Purcell v. Gonzales* does not rule out altogether judicial intervention in the immediate run-up to an election. The circumstances of a particular case might provide sufficiently egregious grounds to warrant such disruption. But the Supreme Court makes plain that the issuance of any such injunction must be accompanied by cogent factual findings and compelling reasons to justify the intrusion into the state’s voting process. Because the Ninth Circuit gave no such findings or reasoning, the Court felt compelled to vacate that court’s injunction. The Court explicitly recognizes the consequence of its decision: “Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.”<sup>175</sup> That consequence, however, is simply the result of the Court’s basic presumption against judicial intervention during the last few weeks before an election, a presumption that the Ninth Circuit never endeavored to overcome.

The *Purcell* opinion quickly sent ripples throughout the judiciary. The Sixth Circuit relied on it when vacating the district court order that threatened to block any enforcement of Ohio’s voter ID law.<sup>176</sup> Likewise, the Fifth Circuit invoked it when vacating the district court’s injunction that

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asserting that *Purcell* “demonstrates little regard or interest in the practical realities of election administration.” Tokaji, *supra*, at 30–31. I believe, instead, that the Court’s concern about the practical difficulties caused by election-eve injunctions was a primary motive for its warning against the issuance of unduly disruptive decrees.

<sup>172</sup> *Purcell*, 127 S. Ct. at 7.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 8.

<sup>176</sup> *NEOCH v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006).



blocked enforcement of the Texas absentee ballot regulation.<sup>177</sup> In that Texas case, the plaintiffs asked the Supreme Court to overturn the Fifth Circuit decision on the ground that *Purcell* stood for the proposition that federal appellate courts should not disrupt decisions reached by federal district courts, absent especially compelling justifications, when the case involves voting procedures and the time is close to Election Day.<sup>178</sup> But that argument fell on deaf ears at the Supreme Court.<sup>179</sup> The true lesson of *Purcell* is an asymmetrical one: federal appellate decisions that grant injunctions denied by district courts will get close scrutiny from the Supreme Court itself, while federal appellate decisions vacating injunctions granted by district courts will receive much more deferential review by the Supreme Court. The reason for this asymmetry, again, is a presumption—we can call it the *Purcell* presumption—against judicial intervention into voting procedures when the time is close to the election itself.<sup>180</sup>

### C. *The Procedural Implications of Bush v. Gore—Revisited*

When seen in the light of the *Purcell* presumption, the decision in *Bush v. Gore* appears very different than in its immediate aftermath. No longer is its most salient feature the fact that the Court intervened in the Florida recount dispute, but rather that the Court ordered the Florida Supreme Court to remove itself from that controversy, just as in *Purcell* the Court ordered the Ninth Circuit to withdraw its interference in that case. The two cases stand together, not as authorizations of judicial intervention in the operations of a state's procedures for casting and counting ballots, but rather as explicit repudiations of two specific instances of such judicial interventions, coupled with more general warnings about comparable interventions in future cases.

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<sup>177</sup> Ray v. Abbot, No. 06-41573, 2 (5th Cir. Nov. 3, 2006) (order granting motion to stay), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Ray-ORDERofUSCAastoNoticeofAppeal.pdf>.

<sup>178</sup> Emergency Application to Vacate Stay, Ray v. Abbot, 127 S. Ct. 551 (Nov. 4, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/RayEmergencyApplication.pdf>.

<sup>179</sup> Ray v. Abbot, 127 S. Ct. 551 (2006) (order denying emergency application to vacate stay), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/RayOrderDenyingStay.pdf>. Justice Souter would have granted the application, but none of the other Justices so indicated.

<sup>180</sup> My reading of *Purcell* differs from Professor Tokaji's in this regard. He evidently does not embrace the asymmetrical presumption insofar as he asserts that the lesson of *Purcell* is for federal courts of appeals to defer to district court decisions regarding the issuance of pre-election injunctions. Rather than believing that the Fifth and Sixth Circuits misread *Purcell* in acting consistently with this asymmetrical presumption, I think these courts of appeals understood the Supreme Court's message correctly.

When put together with *Purcell*, *Bush v. Gore* need not be seen as a red light against all forms of judicial intervention into voting process, whether before ballots are cast or after they are counted. But neither can *Bush v. Gore* be seen as a green light to such lawsuits, even if it appears that many have attempted to view it this way. Rather, both *Bush v. Gore* and the new *Purcell* decision are properly viewed as cautionary yellow lights, signaling to lower courts to be especially careful before interfering with a state's voting procedures, whether before or after the ballots are cast.<sup>181</sup>

Once lower courts pay appropriate heed to this yellow light from the Supreme Court, the level of litigation over voting procedures may scale back down towards levels prior to *Bush v. Gore*. While there will continue to be some meritorious suits, including some premised on the Equal Protection principle of *Bush v. Gore* itself, their relatively low rate of success over time may dampen the enthusiasm for bringing such suits. Litigation no longer will be a campaign strategy to quite the same extent as it has been in these first few years after *Bush v. Gore*.<sup>182</sup>

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<sup>181</sup> This interpretation of *Bush v. Gore* is supported by a comment that Justice Kennedy made for the record to Jan Crawford Greenburg in an interview for her new book:

It would be odd if the people who brought the litigation would later say that the courts shouldn't intervene. . . . We didn't say that the case should go to the court. Those were the other parties that made that decision for us. And for us to say, 'Oh, we're not going to get involved because we're too important,' well, you know, that's wrong.

GREENBURG, *supra* note 100, at 32. As I understand Justice Kennedy's point here, it is that, once the recount is proceeding pursuant to the order of the Florida Supreme Court, then the U.S. Supreme Court has an obligation—given its supervisory authority over federal constitutional questions raised by how the recount is proceeding according to that state court order—to pronounce whether that recount is proceeding in an unconstitutional way. Right or wrong in terms of the Court's exercise of its discretionary certiorari jurisdiction (especially when subsequent congressional procedures were available), Justice Kennedy's perspective is not an invitation to further litigation, either in federal or state court, over the way states administer the casting and counting of ballots. To the extent that candidates and others view *Bush v. Gore* as an invitation to this kind of litigation, they are likely to be disappointed more often than not.

<sup>182</sup> It bears emphasis that this conclusion regarding the procedural dimension of *Bush v. Gore* is distinct from the analysis, in Part II, of the substantive scope of the case's Equal Protection holding. The procedural point concerns the remedial authority of courts, particularly the timing of remedies in relationship to the voting process itself. Much of the procedural caution concerns the issuance of preliminary injunctions and temporary restraining orders as voting is underway or about to begin, or involves the authority of courts to void election results in contrast to ordering carefully tailored injunctive relief well in advance of the next cycle of voting. Thus, understanding *Bush v. Gore* as narrowing the procedural scope of judicial interference with a state's conduct of its voting processes does not necessarily entail (although it would be consistent with) a

IV. THE INSTITUTIONAL SIGNIFICANCE OF *BUSH V. GORE*

Over time, *Bush v. Gore* will contribute to the development of voting administration law. Its Equal Protection holding will have an as-yet-uncertain scope, but it is likely to govern at least a core category of cases involving insufficiently specified ballot-counting rules. As a procedural precedent, it sends a mixed signal about court supervision of voting procedures that eventually will cause campaigns and their attorneys to be careful and selective about relying on litigation to alter the electoral playing field.

But the future of *Bush v. Gore* concerns not just voting administration law specifically, but the role of the Supreme Court in American government more generally. Because the case will be forever known as the one in which the Court picked the President (even if Bush eventually would have prevailed had the dispute gone all the way to Congress), the case will continue to have implications for how both the Justices themselves and other opinion leaders in society view the job the Justices are doing. As an election specialist, I shall largely leave this wider inquiry to others, but some observations here may be worthwhile.

David Cole has recently written that *Bush v. Gore* has already had a perhaps unpredictable yet discernible influence of causing the Court, specifically Justices O'Connor and Kennedy, to be more liberal than otherwise would have been the case.<sup>183</sup> Pointing to prominent decisions like *Grutter* and *Hamdi*,<sup>184</sup> as well as a statistical analysis of 5-4 decisions in the four years immediately before and after *Bush v. Gore*, Cole argues that the vehement criticism of that case produced a kind of internal backlash in the minds of these two Justices and, whether consciously or not, they strove to render opinions that would show them to be fair-minded to their critics.<sup>185</sup> (Cole's thesis can be viewed as a specific instance of more general reputational concern discussed by Baum: the desire of the Justices to be well-respected by intellectual elites, particularly in the media and academia.) Whether true or not, it is interesting to consider the extent to which this phenomenon can be observed in election cases concerning topics other than administrative procedures for casting and counting ballots.<sup>186</sup>

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narrow scope of the Equal Protection principle with respect to the four categories of cases developed in Part II.

<sup>183</sup> David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1443 (2006).

<sup>184</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>185</sup> Cole, *supra* note 183, at 143-46.

<sup>186</sup> In her new book, Jan Crawford Greenburg takes issue with at least a version of Cole's thesis (which she cites): "[T]he suggestion that O'Connor and Kennedy voted with

One example that Cole himself cites<sup>187</sup> is *McConnell v. FEC*, in which Justice O'Connor joined the four liberals to uphold the constitutionality of the McCain-Feingold campaign finance reform law.<sup>188</sup> That result, however, is perhaps better explained by the strength of the factual record that the law's supporters developed to show the corrupting effect of soft money on congressional decisions concerning what laws to enact.<sup>189</sup> Once Justice O'Connor determined that the evidence of corruption was enough to justify the statute's soft-money regulations, the reluctance to split the new statute in half—a move made in *Buckley v. Valeo*<sup>190</sup> that proved counterproductive—combined with an unwillingness to overrule *Austin*<sup>191</sup> even if she disagreed with it, was enough to persuade her to reject the facial challenge to the law's "electioneering communications" provisions. Even before *Bush v. Gore*, moreover, Justice O'Connor had been growing more sympathetic to campaign finance regulations.<sup>192</sup> Thus, it is doubtful that the backlash effect of *Bush v. Gore* provides much explanation for Justice O'Connor's deference to Congress in *McConnell*.<sup>193</sup>

Cole's citation to *Vieth v. Jubelirer*,<sup>194</sup> the partisan gerrymandering case, is more dubious. To be sure, as Cole says, Justice Kennedy did not join the four conservatives (which in that case included Justice O'Connor) to

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the Court's liberals only in the years after *Bush v. Gore*, in order to counter allegations by the media and law professors that they had been driven by rank partisanship, ignores a decade of their earlier rulings on social issues." GREENBURG, *supra* note 100, at 29–30. I did not understand Cole's argument to be the night-to-day transformation that Crawford Greenburg implies with the word "only"; instead, I think, Cole's thesis is that the O'Connor/Kennedy shift to the left after *Bush v. Gore* is more nuanced but nonetheless noticeable.

<sup>187</sup> Cole, *supra* note 183, at 1433, 1436.

<sup>188</sup> 540 U.S. 93 (2003).

<sup>189</sup> Disclosure: I served as a consultant to attorneys representing Senators McCain and Feingold in their defense of their statute in *McConnell v. FEC*.

<sup>190</sup> 424 U.S. 1 (1976).

<sup>191</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>192</sup> See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

<sup>193</sup> Another case that Cole might have cited but did not (it is unclear why) is *Easley v. Cromartie*, the 5-4 decision in which Justice O'Connor joins with the four liberals to reject the claim that the district that North Carolina drew in response to *Shaw v. Reno*, 509 U.S. 630 (1993), was also an unconstitutional racial gerrymander. *Easley v. Cromartie*, 532 U.S. 234 (2001). Like *McConnell*, however, that decision shows less of the backlash influence of *Bush v. Gore* and is attributable more to Justice O'Connor's intensely fact-specific view of when race receives *excessive* consideration as a factor in districting decisions. Once she had set *Shaw* as a marker, she was willing to uphold a district that could be justified on political considerations other than race.

<sup>194</sup> 541 U.S. 267 (2004).

foreclose any chance that a partisan gerrymander might violate Equal Protection. But he did not rule with the four liberals either in identifying an Equal Protection principle upon which the claim could go forward.

Moreover, Justice Kennedy's continued fence-sitting on the issue of partisan gerrymandering, as demonstrated in last year's decision in *LULAC v. Perry*,<sup>195</sup> is a further indication that he will make up his mind in this particular area of law based on a careful consideration of the facts and arguments in each case. His cautious reluctance to police partisan gerrymandering may reflect a lesson learned from *Bush v. Gore*: judicial nullification of a state's election procedures is a tricky matter with potentially major political repercussions. But that lesson would not be a "liberal legacy" of *Bush v. Gore*, but a traditionally conservative one. In any event, Justice Kennedy's careful tiptoeing in the gerrymander field can be seen as a reiteration of the step-by-step jurisprudential methodology articulated in *Bush v. Gore*: every election case with an Equal Protection claim is distinctly complicated in its own way and must be judged narrowly on its own specific facts. Or, as the Court had put it a 1997 case involving the regulation of party labels on a ballot,<sup>196</sup> which the Court again quoted in *Purcell*: "[n]o bright line separates permissible election-related regulation from unconstitutional infringement."<sup>197</sup>

Two other prominent election law cases since *Bush v. Gore* cut against Cole's thesis. In *Georgia v. Ashcroft*,<sup>198</sup> Justices O'Connor and Kennedy joined their three conservative colleagues, over the dissent of the four liberals, to interpret the Voting Rights Act in a way that made it easier for states to win approval of their redistricting plans. And again in *Republican Party of Minnesota v. White*,<sup>199</sup> these two moderates joined the three conservatives, much to the dismay of the four liberals, to invalidate a canon of judicial ethics that barred judicial candidates from announcing their views on issues they would be likely to rule on as judges. It appears that in each of these cases—as in *McConnell*, *Vieth*, and *LULAC*—these two Justices were

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<sup>195</sup> 126 S. Ct. 2594 (2006).

<sup>196</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

<sup>197</sup> *Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006). On one of the Voting Rights Act issues in *LULAC v. Perry*, but not another one, Justice Kennedy did join the liberals to invalidate a specific district on the ground that it diluted Latino voting power. But the impetus of Justice Kennedy's decision on that issue, as evidenced from his questioning at oral argument, was his conservative concern, felt strongly, that race was being used as an inappropriate factor to manipulate several district lines. The liberals who would have reached the same result on somewhat different grounds pragmatically worked with Justice Kennedy to reach an opinion on the issue that they all could join.

<sup>198</sup> 539 U.S. 461 (2003).

<sup>199</sup> 536 U.S. 765 (2002).

making independent decisions about the merits of specific claims in front of them, without being influenced by criticism of *Bush v. Gore*.<sup>200</sup>

In any event, as Cole himself acknowledges, it is questionable whether any liberal legacy of *Bush v. Gore* extends into the Roberts Court era. This is particularly true once a future President has replaced Justices Stevens and, possibly, Ginsburg. If that President, for example, were Fred Thompson, it is likely that the Court would tilt significantly rightward, with little liberal counterweight stemming from a desire to mollify critics of *Bush v. Gore*. Of course, if a Democratic President nominates their replacements, then Justice Kennedy will stay in the center of the Court, and his position in important cases unrelated to elections may reflect some ongoing concern that the Court's institutional reputation be rehabilitated after damage done by *Bush v. Gore*. Even so, the ultimate future of the Court's role in constitutional cases depends much more on who wins the next presidential election than on the psychological effects of *Bush v. Gore* on the Court's deliberations.

Whoever wins the White House in 2008, and whichever direction constitutional law goes as a result, history textbooks presumably will continue to teach *Bush v. Gore* as one of the most prominent cases in which the Court asserted its power. Unlike with *Dred Scott*<sup>201</sup> or *Lochner*,<sup>202</sup> it is not obvious that the verdict of history will be a strong consensus that *Bush v.*

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<sup>200</sup> In a variant of Cole's thesis, Judge J. Harvie Wilkinson of the Fourth Circuit (and interviewed by President Bush for a seat on the Supreme Court) has identified a "split the difference" jurisprudence that developed in the Supreme Court after *Bush v. Gore*. Judge Wilkinson further suggests, albeit very tentatively, that "[t]he Court may have been so shaken by the criticism over *Bush v. Gore* that it sought to reassure the country with a display of centrist evenhandedness." J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1971 (2006). Judge Wilkinson acknowledges, however, that a split-the-difference mentality was on display prior to *Bush v. Gore*—most notably, in *Planned Parenthood v. Casey*—and an acceleration of this trend after 2000 may have been caused by other factors, including an increased confidence in this fact-intensive approach on the part of Justices O'Connor and Kennedy.

Ultimately, I find it hard to believe that these two Justices were *more* fact-specific in their one-case-at-a-time approach to constitutional adjudication as a result of criticism of *Bush v. Gore*, since the most vehement attack upon the reasoning of that precedent was its "we're deciding just this case" sentence. Cass Sunstein had identified fact-specific minimalist reasoning as a hallmark of these two Justices several years before *Bush v. Gore*; see his ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). It is more likely, therefore, that the "split-the-difference" version of this methodology surfaced more prominently as use of this methodology matured over time: each new case worthy of certiorari would likely be one presenting facts in between those of cases settled previously, on one side or the other. On this view, *Bush v. Gore* is much more a product of this methodology than a cause of its increased use.

<sup>201</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>202</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

*Gore* was an inappropriate exercise of the Court's power.<sup>203</sup> Yet even if that is the verdict, it seems doubtful that the implication of that judgment will extend beyond its specific domain: the Court should not exercise jurisdiction over a case that will determine the presidency when procedures exist, even if messy ones, for Congress to make this determination. There are enough other instances of the Court's assertion of power that history has applauded—the Watergate tapes case<sup>204</sup> and the Pentagon Papers case,<sup>205</sup> for example—that the historical lesson of *Bush v. Gore* will never be a repudiation of the Court's power in general.<sup>206</sup>

But if the primary historical significance of *Bush v. Gore* is a judgment about the Court's need for self-restraint in the special circumstances of presidential election procedures, then the case will have little lasting impact upon the future development of constitutional law generally.<sup>207</sup> To be sure, as we have seen, there will emerge the specific constitutional doctrine that defines the scope of the Equal Protection principle invoked in *Bush v. Gore*, but that doctrine will develop in elections involving offices other than the presidency and will remain a rather small subset of Equal Protection law as it applies to elections. Likewise, there will also develop a procedural jurisprudence on when courts can insert themselves into the voting process generally, whether or not the presidency is on the ballot. But although *Bush v. Gore* will have contributed to that procedural jurisprudence, its contributions to that case law will be superseded quickly by more germane and recent precedents, like *Purcell v. Gonzalez*. Thus, perhaps ironically, *Bush v. Gore* will leave its biggest mark on American law in circumstances that have nothing to do with the presidency, while in this particular context—

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<sup>203</sup> Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001).

<sup>204</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>205</sup> *New York Times v. United States*, 403 U.S. 713 (1971).

<sup>206</sup> Shortly after the Court's decision in *Bush v. Gore*, Cass Sunstein speculated how the case might be viewed in 2050. He suggested that it would be seen as ushering in an era of judicial restraint known as "the Quiet Court." *What We'll Remember in 2050: 9 Views of Bush v. Gore*, CHRON. OF HIGHER EDUC. (Wash. D.C.), Jan. 5, 2001, at 15 (statement by Cass Sunstein). While we have not yet finished even one decade toward the mid-century mark, there is already much to suggest that this particular prognostication is inaccurate: even if the judicial muscle-flexing of *Lawrence v. Texas*, or *Hamdan v. Rumsfeld*—or any of the Court's section 5 or punitive damages decisions—were not a byproduct of *Bush v. Gore*, these examples refute the proposition that the Court has been especially restrained since then. If an accelerating trend towards greater judicial restraint occurs between now and 2050, it will be because of new appointments to the Court, or other developments, rather than a general jurisprudential backlash to *Bush v. Gore*.

<sup>207</sup> Klarman, *supra* note 203, at 1736.

for which it is deemed most significant—it is likely ultimately to prove most trivial.

## V. CONCLUDING OBSERVATION

When I had the opportunity to present a version of this Article to a group of local election officials, it struck me that perhaps its most useful point is the one that ends Part II: if I am right that, more likely, it will be decades rather than years before the Supreme Court revisits the Equal Protection precedent of *Bush v. Gore*, then the analogy to *Bakke* may prove apt. The Equal Protection law of *Bush v. Gore* will develop a life of its own during those decades without interference from the Supreme Court itself, and that organic development may turn out to influence the Court when it eventually does return to this precedent. Just as *Bakke*-in-practice for a quarter-century shaped Justice O'Connor's thinking in *Grutter* as much as *Bakke*-in-print, so too may *Bush v. Gore*, as developed from one election to the next in the trenches of voting administration, end up shaping some future "swing Justice" much more than the sparse words of *Bush v. Gore* on the page.

In an effort to imagine how election officials themselves will come to use and thus understand *Bush v. Gore*, the four-part categorization of potential *Bush v. Gore*-based claims (developed in Part II.B) may be illuminating. For example, will election officials fear (or accept) that local variations caused by mistaken interpretation of statewide rules violate the Equal Protection principle of *Bush v. Gore*, thereby leading to a self-fulfilling prophecy? (As a result of this self-fulfilling prophecy, the organically developed law of *Bush v. Gore* would recognize that discriminatory disenfranchisement caused by local mistakes is just as unconstitutional as discriminatory disenfranchisement caused by variations in local interpretations of a vague statewide rule.) Similarly, will election officials believe that they cannot defend the constitutionality of local inequalities in voting opportunities caused by arbitrary, unreasoned exercises of administrative discretion—so that the well-developed prevailing understanding of *Bush v. Gore* embraces the proposition that cases of this kind present valid Equal Protection claims? Although I developed the four-part taxonomy of potential *Bush v. Gore* cases in an effort to discern how the Supreme Court might view these cases, perhaps distinguishing among them, I see now that there is even greater practical advantage in attempting to anticipate how election officials might treat each of these distinct situations. Likewise, it is especially useful to contemplate how the lower courts will adjudicate these claims for the presumably long time it takes until the Supreme Court involves itself again with this topic.

Moreover, the room for local election officials and lower federal courts to develop their own jurisprudence of *Bush v. Gore* "in the trenches" results



from the enormous uncertainty of how the Supreme Court would decide many of the potential claims that could arise under this precedent. As we have seen in sub-Parts II.C and II.D, this extreme uncertainty exists whether we examine the question of what the Supreme Court ideally ought to do in each of these cases (in a Herculean quest to identify the “right answer” for each one) or we more realistically consider how the actual Justices themselves are likely to rule.

In sum, while this Article began with thinking about how the Supreme Court would determine the law of *Bush v. Gore* in each of these categories, the Article ends by suggesting that how the law of *Bush v. Gore* develops on its own in each of these four categories may ultimately determine what the Court itself accepts as the meaning of this remarkable precedent.

### POSTSCRIPT

The release of Jeffrey Toobin’s much-heralded book *The Nine* came shortly after the editing of this Article was complete. Although Toobin’s book contains an extensive (and interesting) discussion of *Bush v. Gore*, that discussion—even assuming its accuracy, which I am in no position to either confirm or refute—does not alter the analysis or conclusions in this Article. Most significantly, it remains true that it is unlikely that the Supreme Court will consider a case involving the Equal Protection principle of *Bush v. Gore* for many years, long after the composition of the Court has changed (thereby compounding the many difficulties of predicting how the Court will apply this Equal Protection principle in the future).

Toobin does describe Justice Kennedy as eager for the Court to grant review in *Bush v. Gore* itself. (“His hunger for the case was palpable.”<sup>208</sup>) But it does not follow that Justice Kennedy, or other Members of the Court, would be equally eager to grant review to the first new case that would enable the Court to apply and elucidate the Equal Protection holding of *Bush v. Gore*. The old aphorism “once burned, twice shy” suffices to explain this point. In any event, for the reasons analyzed in Part II.E, there is a complex set of considerations, including lingering emotions on and off the Court about *Bush v. Gore* itself, that will affect when the Court will take a case requiring it to apply that precedent.

Moreover, as for the merits of any new claim relying on that precedent, Toobin’s book does not change the calculus concerning the factors that may affect the scope of the Equal Protection principle, as it develops over time from one case to another in a path-dependent way. Toobin’s account confirms that Justice Kennedy will want the Equal Protection holding of

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<sup>208</sup> JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 147 (2007).

*Bush v. Gore* to appear principled whenever it becomes applied to a future fact pattern. ("The Equal Protection Clause suited Kennedy's romantic conception of the work of the Supreme Court."<sup>209</sup>) Likewise, Toobin offers no reason to think that any of the current so-called "liberals" on the Court—Justices Stevens, Souter, Ginsburg, and Breyer—would reject invoking the Equal Protection principle of *Bush v. Gore* in a case involving discriminatory disenfranchisement that they considered unfair and requiring a remedy. Even Toobin's description of Justice Souter as crying (and almost resigning) over the outcome of *Bush v. Gore*, an account which has been questioned by others, does not negate this observation. Justice Souter's objection, as I discuss in Part II.D.2, concerned the Court's decision to intervene and halt the Florida recount in 2000, not the merits of the majority's Equal Protection principle. In different procedural circumstances, Justice Souter might well be among the first to insist on evenhanded treatment of the electorate regarding the counting of votes. In any event, to reiterate, for reasons entirely unrelated to *Bush v. Gore*, Justice Souter (like others among his current colleagues) may no longer be on the Court when it comes time to give shape to that controversial precedent.

Finally, as anticipated in this Article, the future meaning of *Bush v. Gore* will be shaped by collateral developments concerning the Equal Protection Clause's applicability to issues of voting administration, including the voter identification question that the Supreme Court has agreed to hear.<sup>210</sup> Although this voter identification question does not itself directly implicate the specific *Bush v. Gore* principle (for reasons I have elaborated in this Article<sup>211</sup>), and although the Court's voter identification opinion may not cite *Bush v. Gore*, this new opinion—whichever way it rules—may affect the Court's future understanding of the scope of *Bush v. Gore* itself, whenever the Court does decide a case that directly implicates that precedent (in other words, one of the kinds described in the taxonomical account in Part II.B). In this way, the recent grant of certiorari in the Indiana voter identification litigation underscores one of the primary observations of this Article: path-dependency is not merely internal to the cases within the direct ambit of *Bush v. Gore*, involving discriminatory treatment of voters as a result of local variations; rather, path-dependency encompasses adjacent fields of Equal Protection law concerning the operation of elections, thus exacerbating the problems of predicting the future of *Bush v. Gore*.

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<sup>209</sup> *Id.* at 172.

<sup>210</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *cert granted*, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 07-21); *Ind. Democratic Party v. Rokita*, 472 F.3d 949 (7th Cir. 2007), *cert granted*, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 07-25).

<sup>211</sup> *See, supra*, text accompanying notes 126–29.